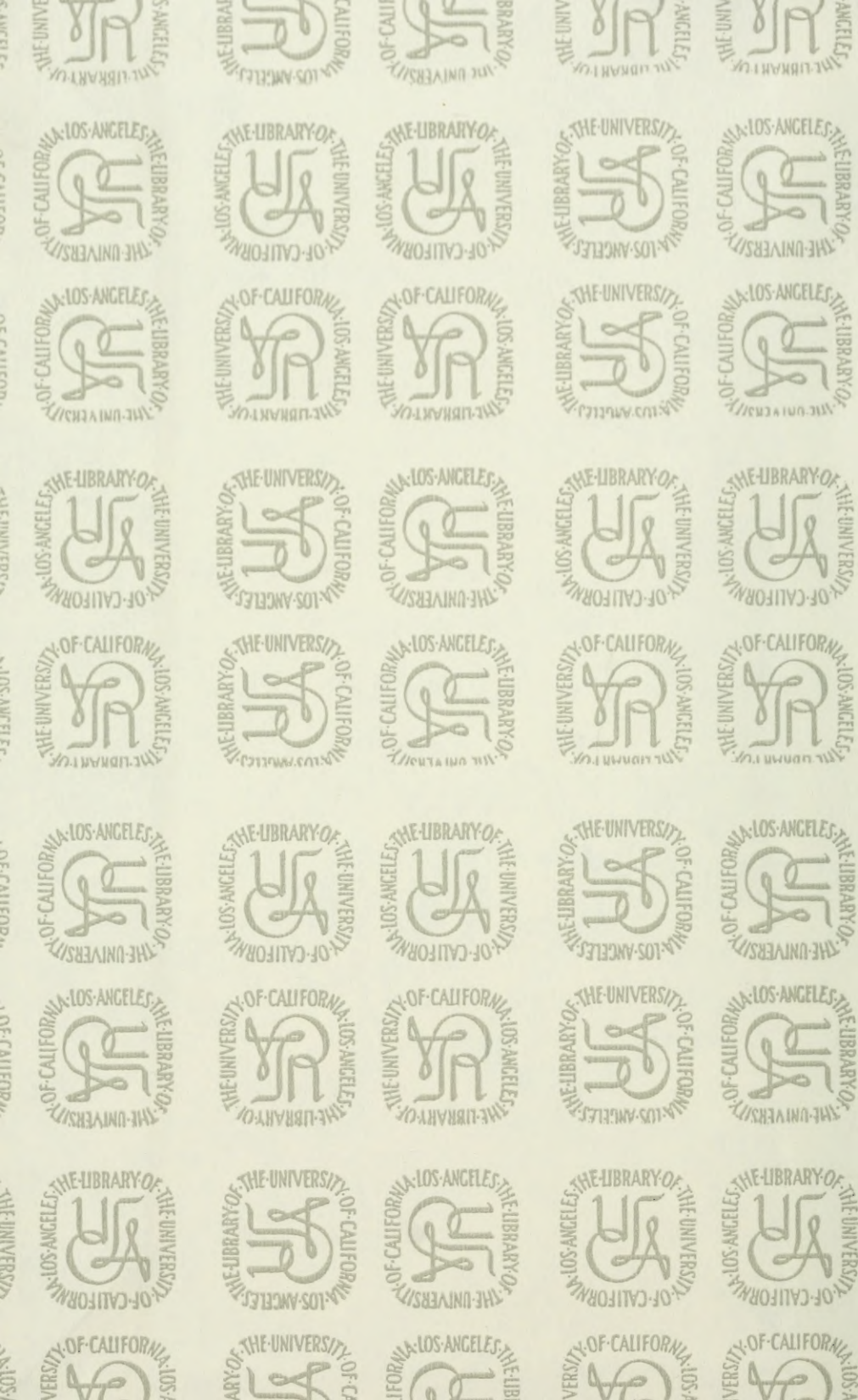
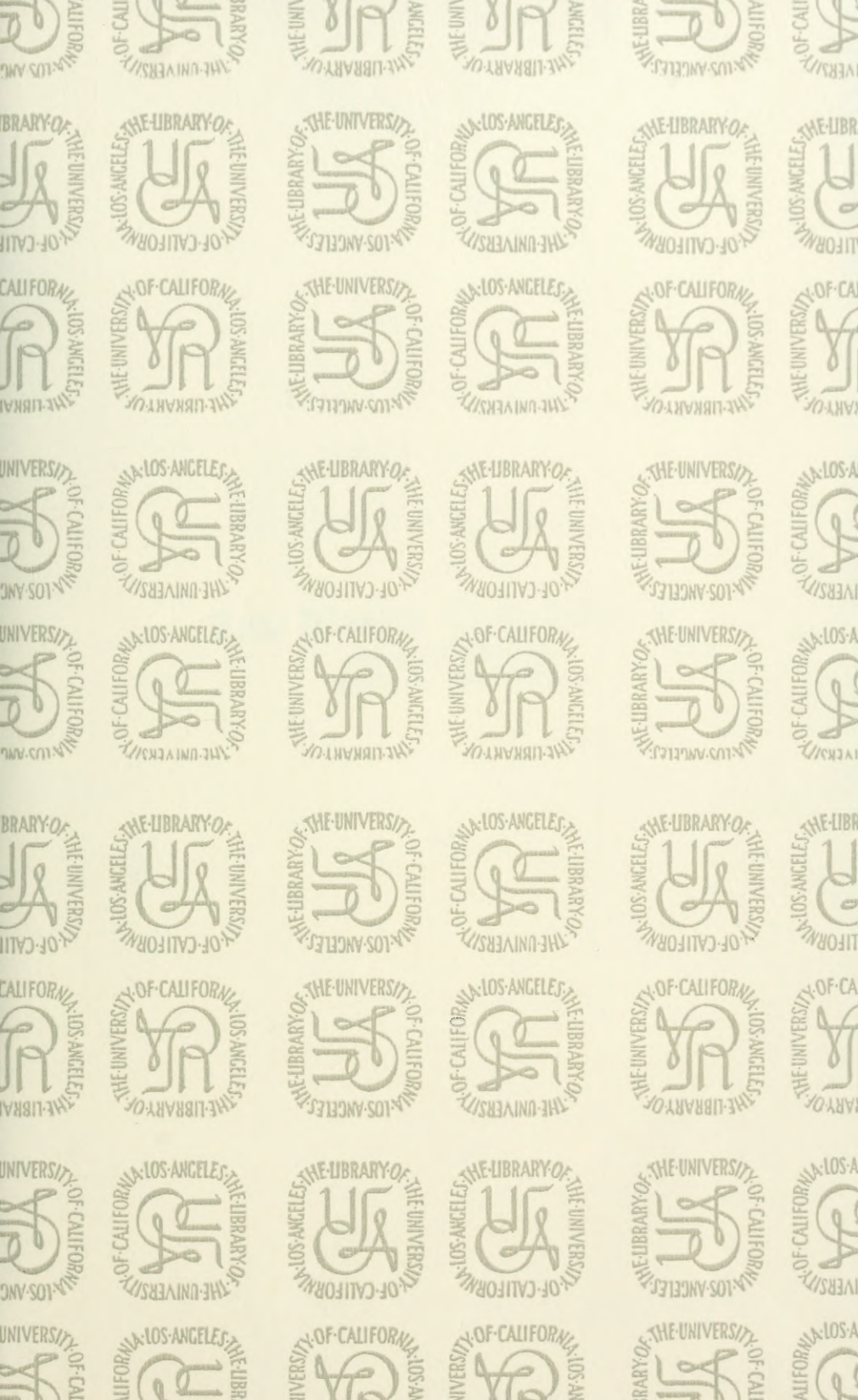


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AN ESSAY  
ON  
THE PRINCIPLES  
OF  
CIRCUMSTANTIAL EVIDENCE

*Illustrated by Numerous Cases*

BY THE LATE  
WILLIAM WILLS, ESQ.  
JUSTICE OF THE PEACE

*EDITED BY HIS SON*  
SIR ALFRED WILLS, KNT.  
ONE OF HIS MAJESTY'S JUDGES OF THE HIGH COURT OF JUSTICE

FIFTH ENGLISH EDITION (1902)

WITH AMERICAN NOTES  
By GEORGE E. BEERS  
OF THE NEW HAVEN BAR; OF THE FACULTY OF THE YALE LAW SCHOOL  
AND  
ARTHUR L. CORBIN  
OF THE FACULTY OF THE YALE LAW SCHOOL

BOSTON, MASS.  
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## PREFATORY NOTE.

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In the present edition the English text is preserved intact, the American notes following at the end of each chapter. While the primary object has been to furnish a working tool for the profession, it is the hope of the American editor that it may be said of the notes, as it has so long been said of the text, that much is embraced in them of vital human interest to both lawyer and layman.

While the work was originally undertaken by Mr. Beers, he was prevented by professional engagements from giving that continuity of attention which labor of this character demands. He desires to express his obligation to Mr. Arthur L. Corbin, assistant professor in the Yale Law School, for his effective assistance in the undertaking. He is also indebted for much aid and many kindnesses to Mr. Charles F. Chamberlayne, who has placed a large amount of material at his disposal and has ever been ready with suggestions and encouragement.

G. E. B.

42 CHURCH ST.,  
NEW HAVEN, CONN.,  
June 22, 1905



# PREFACE

TO THE FIFTH EDITION.

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THIS work of my father's having met with a favourable reception from the legal profession as well when originally published in 1838 as upon the publication of later editions in 1850 and 1862, I have thought that a further edition, illustrated by later cases, many of which have come under my own personal observation, might fairly be attempted.

Some modifications of the original text have necessarily been introduced. The nature of my professional life has brought me into closer touch with many of the questions discussed than could be the case with my father, who was for many years a solicitor in large practice at Birmingham. The text has been most carefully revised and reconsidered throughout, but it is no more than is due to him to say that in substantial

matters I have found very little to alter. I did at one time contemplate indicating the alterations by brackets, but I found the plan practically impossible; and I am quite sure that my father would not have objected to the amalgamation of our respective parts in the joint work. To him must always belong the principal share of any credit this volume may deserve.

The additional matter, therefore, which will be found in this edition consists largely of illustrations of the principles laid down in the text drawn from cases of a later date than that of the last edition. In some of them I have been engaged as counsel, some I have tried as a judge, some I have gathered from the relation of friends upon whom I could depend. The rest have been found for me in the Old Bailey Sessions Papers, in the files of *The Times* or other contemporary records. For the use made of them I am responsible.

From the section at the end of the work containing details of some remarkable cases illustrative of the proving force of circumstantial evidence, one case (*Reg. v. Smith*,

*Varnham, and Timms*) has been omitted which upon consideration did not appear to be of sufficient interest to justify its retention. On the other hand, three new cases will be found which are perhaps as remarkable in this connection as any which have ever been tried: the *Matlock Will* case, in which I was counsel, the case of *Howe v. Burchardt and another*, which I tried, and the *Yarmouth Murder* case. The *Matlock Will* case and *Howe v. Burchardt* are distinguished by one very curious circumstance which I do not remember to have seen or heard of in any other instance. In each, the question in the cause was whether certain documents were forgeries. In each, it ultimately turned out that a single stroke of the pen afforded an absolutely infallible test of the genuineness of the documents in question. In each case, the indication had escaped the observation of the experts, and I was fortunate enough to discover it.

In the present edition both quotations and references have been carefully revised.

The original work met with much recognition abroad as well as at home, and it was

a source of natural gratification to my father that it had brought him into personal relations with some very eminent juridical writers—amongst others, with Dr. Mittermaier in Germany, and with Professor Greenleaf in the United States, from both of whom I found interesting letters amongst my father's papers after his death.

In the United States an edition was published during the author's lifetime, and another, if not more than one, after his death. I possess a reprint of the edition of 1862, published in Philadelphia in 1881, which is styled "Sixth American from the Fourth London Edition." Literary property in books by English authors had at that time no recognition in the United States. It is still recognized only on terms too onerous to make it worth while, with a work of limited circulation, to claim the protection of American law. Arrangements have been made, however, with a Boston firm, which, if they give no appreciable pecuniary advantage to myself as the owner of the English copyright, at least secure that an edition shall be published in the United States identical in matter with the English edition.

There is some reason for a wish that this should be possible. Amongst the American admirers of the edition published in 1862—if admiration may be fairly inferred from wholesale appropriation—is a gentleman who published in 1896, at Philadelphia, a volume entitled “A Treatise on the Law of Circumstantial Evidence, illustrated by numerous cases, by Arthur P. Will, of the Chicago Bar.” Mr. Will’s book contains a considerable amount of original matter—perhaps about half of the volume is his own—and is especially rich in American cases. In a short preface Mr. Will says :

“The writer, in presenting to the profession a volume thoroughly American, begs to acknowledge his indebtedness to the essay of Mr. William Wills, the last edition of which was prepared by his son, Judge Alfred Wills. It has been thought wisest to follow Mr. Wills’s plan in its main divisions, and to preserve much that is valuable in his scientific discussion concerning the phenomena on which the rules of circumstantial evidence are based.”

The edition of 1862 which is here referred to contains 315 pages. Of these, six constitute a section on “Statutory Presumptions,” which deals exclusively with English

statute law, and therefore was not likely to be useful to Mr. Will. Of the remaining 309 pages, Mr. Will has appropriated all but an insignificant fraction (*a*). The very divisions are in most cases preserved, the only difference being that they are often called "chapters" instead of sections. The titles indicating the subject-matter of the divisions have rarely been altered. Clerical and accidental errors have remained uncorrected, except in the account of *Palmer's* case. In the edition of 1862 there was a confusion in the dates, one Monday being described as both the 18th and the 20th November, and one or two other dates being wrong. Mr. Will has made corrections by which they accord with one another. Unfortunately, the corrections are not themselves correct. Mr. Will did not consult the almanac of 1855. If there is any more trace of original work in the copying (other than a few purely verbal alterations) I have failed to find it out.

(*a*) Desiring to be accurate I have marked in the margins of a copy of the edition of 1862 the pages of Mr. Will's book, where the text of my father's work will be found, and the extent of the respective passages appropriated. Only 365 *lines* remain unmarked.

I have only to add that should Mr. Will be disposed to make a similar use of the present edition, I hope he will remember that this preface is as much at his disposal as any other part of the book.

I am greatly indebted to Dr. Dupré, F.R.S., so well known in connection with medical jurisprudence, for his kindness in revising the notice at pp. 144—146 of the acknowledged methods of detecting bloodstains, and of the extent to which discrimination between different kinds of blood has hitherto been considered possible. A note at the end of the volume by my son, Dr. Wills, contains an interesting summary of the latest discoveries of science relating to the examination of bloodstains and their identification with the blood of different animals—an achievement which has up till very lately been deemed impossible. The methods indicated have certainly not as yet been employed in judicial investigations in this country, and whether they are really to be depended upon in practice remains to be seen. The subject is a very important one, and should the processes indicated prove to be reliable, a source of difficulty in some cases of murder

will be removed, and an addition made to the resources of science which will at times be of the greatest assistance, both in the detection of crime and in the protection of innocence.

I have in conclusion to express my obligations to my nephew, Mr. Wm. Wills, of the Midland Circuit, from whom I received the greatest assistance in arranging the plan of the new edition and the selection of additional matter, and to Mr. Thornton Lawes, of the Western Circuit, who has been indefatigable in helping me, not merely in abstracting cases and bringing references to the statute law and to decisions up to date, but also in securing uniformity in methods of citation and in the necessary though tedious work of correcting the proofs. The excellent index is also his. I have also to thank Mr. H. O. Buckle for a prolonged and careful search through the files of *The Times* for many years back. It is interesting to be able to add that after carrying his rifle as a member of the Inns of Court Volunteer Corps through the earlier phases of the South African war to Pretoria, he has been appointed to a judicial office at

Johannesburg, where I am sure he will do good service to the Colony in administering justice as he did to his country in helping to fight her battles.

The Lord Chief Justice of England has kindly revised for me the account of a great trial over which he presided, *Rex v. Bennett*, generally known as the *Yarmouth Murder* case.

ALFRED WILLS.

ROYAL COURTS OF JUSTICE,

*July, 1902.*



## EXTRACT FROM THE PREFACE

TO THE ORIGINAL EDITION OF 1833.



IT has not always been practicable to support the statement of cases by reference to books of recognized authority, or of an equal degree of credit; but discrimination has uniformly been exercised in the adoption of such statements: and they have generally been verified by comparison with contemporaneous and independent accounts. A like discretion has been exercised in the rejection of some generally received cases of circumstantial evidence, the authenticity of which does not appear to be sufficiently established.

W. W.

EDGBASTON, NEAR BIRMINGHAM,

*February, 1838*



# THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE.

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## CHAPTER I. EVIDENCE IN GENERAL.

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### SECTION I.

#### THE NATURE OF EVIDENCE.

It will greatly conduce to the formation of clear and correct notions on the subject of Circumstantial Evidence, to take a brief introductory view of the nature of evidence in general, of some of its various kinds, and of the nature of the assurance which each of them is calculated to produce.

The great object of all intellectual research is the discovery of TRUTH, which is either OBJECTIVE AND ABSOLUTE, in which sense it is synonymous with being or existence, or SUBJECTIVE AND RELATIVE, in which acceptation it expresses the conformity of our ideas and mental convictions with the nature and reality of events and things.

The JUDGMENT is that faculty of the mind which is principally concerned in the investigation and acquisition of truth ; and its exercise is the intellectual act by which one thing is perceived and affirmed of another, or the reverse.

Every conclusion of the judgment, whatever may be its subject, is the result of EVIDENCE,—a word which (derived from two Latin words signifying to see out, to trace out by sight), by a natural transition is applied to denote the *means* by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

The term PROOF is often confounded with evidence, and applied to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence. When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of inquiry, such event or proposition is said to be *proved* ; and, according to the nature of the evidence on which such conclusion is grounded, it is either *known* or *believed* to be true. Our judgments, then, are the consequence of proof in its secondary sense ; and proof is the final result of that quantity of appropriate evidence which produces assurance and certainty ; evidence therefore differs from proof, as cause from effect.

It is unnecessary, in relation to the subject of this section, to mention the inferior degrees of assurance, which will be more appropriately noticed in another place.

## SECTION 2.

## THE VARIOUS KINDS OF EVIDENCE.

TRUTH is either abstract and necessary, or probable and contingent ; and each of these kinds of truth is discoverable by appropriate, but necessarily different kinds of evidence. This classification, however, is not founded in any essential difference in the nature of truths themselves, and has reference merely to our imperfect capacity and ability of perceiving them ; since to an Infinite Intelligence nothing which is the object of knowledge can be probable, and everything must be perceived absolutely and really as it is (*a*).

In many instances the correspondence of our ideas with realities is perceived instantaneously, and without any conscious intermediate process of reasoning, in which cases the judgment is said to be INTUITIVE, from a word signifying to look at ; and the evidence on which it is founded is also denominated intuitive ; though it would perhaps be more correct to use that word as descriptive of the nature of the mental operation, rather than of the kind of evidence on which it rests.

INTUITION is the foundation of DEMONSTRATION, which consists of a series of steps severally resolvable into some intuitive truth. Demonstration concerns only necessary and immutable truth ; and its first principles are definitions, which exclude all

(*a*) Butler's Analogy, Introduction.

ambiguities of language, and lead to infallibly certain conclusions (*b*).

But the subjects which admit of the certainty of intuition and demonstration are comparatively few. Innumerable truths, the knowledge of which is indispensable to happiness, if not to existence, depend upon evidence of a totally different kind, and admit of no other guide than our own observation and experience, or the testimony of our fellow-men. Such truths involve questions of fact or of actual existence, which, as they are not of a necessary nature, may or may not have existed, without involving any contradiction, and as to which our reasonings and deductions may be erroneous. Such evidence is called MORAL EVIDENCE; probably because its principal application is to subjects directly or remotely connected with moral conduct and relations.

Of the various kinds of moral evidence, that of TESTIMONY is the most comprehensive and important in its relation to human concerns; so extensive in its application, that to enter on the subject of testimony at large, would be to treat of the conduct of the understanding in relation to the greater portion of human affairs. The design of this essay is limited to the consideration of some of the principal rules and doctrines peculiar to circumstantial evidence as applicable to criminal jurisprudence,—one of the leading heads under which philosophical and juridical writers consider the subject of

(*b*) Stewart's Elements of the Philosophy of the Human Mind, vol. ii. ch. ii. s. 3.

testimonial evidence. Nor is it proposed to treat, except cursorily and incidentally, of *documentary* circumstantial evidence; a subject which, however interesting in itself, is applicable principally to discussions upon the genuineness of historical and other writings; and such cases of this description as occasionally happen in the concerns of common life, are referable to general principles, which equally apply to circumstantial evidence of every kind.

Considering how many of our most momentous determinations are grounded upon circumstantial evidence, and how important it is that they should be correctly formed, the subject is one of deep interest and moment. It would be most erroneous to conclude that, because it is illustrated principally by forensic occurrences, it especially concerns the business or the members of a particular profession. Such *events* are amongst the most interesting occurrences of social life; the *subject* relates to an intellectual process, called into exercise in almost every branch of human speculation and research.

### SECTION 3.

#### NATURE OF THE ASSURANCE PRODUCED BY DIFFERENT KINDS OF EVIDENCE.

IN investigations of every kind it is essential that a correct estimate be made, of the kind and degree of assurance of which the subject admits.

Since the evidence of DEMONSTRATION relates to

necessary truths (as to which the supposition of the contrary involves not merely what is not and cannot be true, but what is also absurd), and since MORAL EVIDENCE is the basis of contingent or probable truth merely, it follows that the convictions which these various kinds of evidence are calculated to produce must be of very different natures. In the former case ABSOLUTE CERTITUDE is the result ; to which MORAL CERTAINTY, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior.

Unlike the assent, which is the inevitable result of mathematical reasoning, BELIEF in the truth of events may be of various degrees, from moral certainty, the highest, to that of mere probability, the lowest ; between which extremes there are innumerable degrees and shades of conviction, which the latency of mental operations and the unavoidable imperfections of language render it impossible to define or express. In subjects of moral science, the want of appropriate words, and the occasional application of the same word to denote different things, have given occasion to much obscurity and confusion both of idea and expression ; of which a remarkable exemplification is presented in the words probability and certainty.

The general meaning of the word PROBABILITY is likeness or similarity to some other truth, event, or thing (*c*). Sometimes the word probability is used

(*c*) Butler's Analogy, Introduction ; Locke's Essay concerning Human Understanding, b. iv. ch. xv. ; Cic. De Inventionem Rhetorica, lib. I. c. 47.

to express the preponderance of the evidence or arguments, in favour of the existence of a particular event or proposition, or adverse to it; and sometimes as assertive of the abstract and intrinsic credibility of a fact or event (*d*).

In its former sense the word probability is applied as well to certain mathematical subjects, as to questions dependent upon moral evidence, and expresses the ratio of the favourable cases to all the possible cases by which an event may happen or fail; and it is represented by a fraction, the numerator of which is the sum of the favourable cases, and the denominator the whole number of possible cases, certainty being represented by unity. If the number of chances for the happening of the event be  $o$ , and the event be consequently impossible, the expression for that chance will be  $o$ ; and so, if the number of chances of the failure of the event be  $o$ , and the event be therefore certain, the expression for the chance of failure will also be  $o$ . If  $m+n$  be the whole number of cases,  $m$  the favourable and  $n$  the unfavourable ones, the probability of the event is  $m : m+n$ . It follows, that if there be an equality of chances for the happening or the failing of an event, the fraction expressive of the probability is  $\frac{1}{2}$ , the mean between certainty and impossibility (*e*); and probability therefore includes the whole range between those extremes.

(*d*) The latter sense, however, scarcely differs in character from the former; inasmuch as its real meaning is that the event or fact in question is consonant with other accepted facts.

(*e*) Kirwan's Logic, part iii. ch. vii. s. 1.

The terms CERTAINTY and PROBABILITY are however essentially different in meaning as applied to moral evidence, from what they import in a mathematical sense; inasmuch as the elements of moral certainty and moral probability, notwithstanding the ingenious arguments which have been urged to the contrary, appear to be incapable of numerical expression, and because it is not possible to reduce to a number all the chances for or against the occurrence of any particular event.

The expression MORAL PROBABILITY, though liable to objection on account of its deficiency in precision, is for want of one more definite and appropriate, of frequent and necessary use; nor will its application lead to mistake, if it be remembered, that it denotes only the preponderance of probability, resulting from the comparison and estimate of *moral* evidence, and that if this were capable of being expressed with exactness, it would lose its essential characteristic and possess the certainty of demonstration.

The preceding strictures equally apply to the term MORAL CERTAINTY, or its equivalent MORAL CONVICTION, which must be understood, not as importing deficiency in the proof, but only as descriptive of the kind of certainty which is attainable by means of moral evidence; and it is that full and complete assurance which induces a sound mind to act without doubt upon the conclusions to which it naturally and reasonably leads (*f*).

(*f*) Stewart's Elements of the Philosophy of the Human Mind, vol. ii. ch. ii. s. 4; Encyclopædia Brit., art. *Metaphysic*, part i.

It has been justly and powerfully remarked by a noble and learned writer, that "the degree of excellence and of strength to which testimony may rise seems almost indefinite. There is hardly any cogency which it is not capable by possible supposition of attaining. The endless multiplication of witnesses—the unbounded variety of their habits of thinking, their prejudices, their interests—afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us" (*g*). But if evidence leave reasonable ground for doubt, the conclusion cannot be morally certain, however great may be the preponderance of probability in its favour.

Some mathematical writers have propounded numerical fractions for expressing moral certainty; which, as might have been expected, have been of very different values. But the nature of the subject precludes the possibility of reducing to the form of arithmetical notation the subtle, shifting, and evanescent elements of moral assurance, or of bringing to quantitative comparison, things so inherently different as certainty and probability.

Other writers have given, in a more general manner, mathematical form to moral reasonings and judgments; but it is questionable if they have done so with any useful result, however they may have

(*g*) Lord Brougham's Discourse on Natural Theology, Note V.

shown their own ingenuity (*h*). Though it is true that some very important deductions from the doctrine of chances are applicable to events dependent upon the duration of human life, such as the expectation of life, the law of mortality, the value of annuities and similar contingencies, and a variety of other matters with respect to which definite statistical information is obtainable, yet it is obvious, that all such conclusions depend upon circumstances, which, notwithstanding that to the unreflecting observer they appear casual, uncertain, and irreducible to principle, unlike moral facts and reasonings in general, are really based upon and deducible from numerical elements.

A learned writer, whose writings, in despite of his eccentricities of matter and of style, have exercised great influence in awakening the spirit of judicial reform, asks (*i*), "Does justice require less precision than chemistry?" The truth is, that the precision attainable in the one case is of a nature of which the other does not admit. It would be absurd to require the proof of an historic event, by the same kind of evidence and reasoning as that which establishes the equality of triangles upon equal bases and between the same parallels, or that the *latus rectum* in an ellipse is a third proportional to the major and minor axes.

(*h*) See Kirwan's Logic, part iii. ch. vii. s. 21; Whately's Logic, b. iv. ch. ii. s. 1.

(*i*) Bentham's *Traité des Preuves Judiciaires* (par Dumont), b. i. ch. xvii. Bentham originally wrote, "Has not justice its use as well as gas?" See reference note (*l*), *infra*. Mackintosh's *Dissertation on the Progress of Ethical Philosophy*, 290.

This conscript father of legal reforms (*k*) has himself supplied a memorable illustration of the futility of his own inquiry. He has proposed a scale for measuring the degrees of belief, with a positive and a negative side, each divided into ten degrees, respectively affirming and denying the same fact, zero denoting the absence of belief; and the witness is to be asked what degree expresses his belief most correctly. With characteristic ardour, the venerable author gravely argues that this instrument could be employed without confusion, difficulty, or inconvenience (*l*). But MAN must become wiser and better before the mass of his species can be entrusted with the use of such a moral gauge, from which the unassuming and the wise would shrink, while it would be eagerly grasped by the conceited, the interested and the rash.

But though a process strictly mathematical cannot be applied to estimate the effect of moral evidence, a proceeding somewhat analogous is observed in the examination of a group of facts adduced as grounds for inferring the existence of some other fact. Although an *exact* value cannot be assigned to the testimonial evidence for or against a matter of disputed fact, the separate testimony of each of the witnesses has yet a more or less determinate *relative* value, depending upon considerations which it would be foreign to the present subject to enumerate. On

(*k*) 1 Hoffman's Course of Legal Study, 364.

(*l*) Bentham's Rationale of Judicial Ev., b. i. ch. vi. s. 1, and see in Kirwan's Logic, part iii. ch. vii. s. 21, a proposed scale of testimonial probability.

one side of the equation are mentally collected all the facts and circumstances which have an affirmative value; and on the other, all those which either lead to an opposite inference, or tend to diminish the weight, or to show the non-relevancy, of all or any of the circumstances which have been put into the opposite scale. The value of each separate portion of the evidence is separately estimated, and as in algebraic addition, the opposite quantities, positive and negative, are united, and the *balance* of probabilities is what remains as the ground of human belief and judgment (*m*).

But, as has been already intimated, there is another sense in which the word probability is often used, and in which it denotes CREDIBILITY or INTERNAL PROBABILITY, and expresses our judgment of the accordance or similarity of events with which we become acquainted, through the medium of testimony with facts previously known by experience (*n*).

The results of EXPERIENCE are, expressly or impliedly, assumed as the standard of credibility in all questions dependent upon moral evidence. By means of the senses and of our own consciousness we become acquainted with external nature, and with the characteristics and properties of physical

(*m*) See some remarks on this passage in a learned paper "On the Measure of the Force of Testimony in Cases of Legal Evidence," by John Tozer, Esq., M.A., Transactions of the Cambridge Philosophical Society, vol. iii. part ii. (Cambridge, 1844), and 36 Phil. Mag., 3rd ser. 78.

(*n*) Abercrombie on the Intellectual Powers, part ii. s. 3.

things and moral beings, which are then made the subjects of memory, reflection, and other intellectual operations ; and thus ultimately the mind is led to the recognition of the principle of causality and other necessary truths, which become the basis and standard of comparison in similar and analogous circumstances. The groundwork of our reasoning is an instinctive and inevitable belief in the truthfulness and legitimacy of our own faculties and in the permanence of the order of external nature, as also in the existence of moral causes, which operate with an unvarying uniformity, not inferior to the stability of physical laws ; though, relatively to our feeble and limited powers of observation and comprehension, and on account of the latency, subtlety, and fugitiveness of mental operations, and of the infinite diversities of individual men, there is apparently more of uncertainty and confusion in moral than in material phenomena (*o*).

Experience comprehends not merely the facts and deductions of personal observation, but the observations of mankind at large of every age and country. It would be absurd to disbelieve and reject as incredible the relations of events, because such events have not occurred within the range of individual experience. We may remember the unreasonable incredulity of the King of Siam, who when the Dutch ambassador told him that in his country the water in cold weather became so hard that men walked upon it, and that it would even bear an elephant,

(*o*) Hampden's Lectures on Moral Philosophy, 150 ; Abercrombie's Philosophy of the Moral Feelings, Prelim. Obs. s. ii.

replied, "Hitherto I have believed the strange things you have told me, because I looked upon you as a sober, fair man, but now I am sure you lie" (*p*).

By experience facts or events of the same character are referred to causes of the same kind ; by ANALOGY facts and events similar in some, but not in all of their particulars to other facts and occurrences, are concluded to have been produced by a similar cause : so that analogy vastly exceeds in its range the limits of experience in its widest latitude, though their boundaries may sometimes be coincident and sometimes indistinguishable. It has been profoundly remarked that "in whatever manner the province of experience, strictly so called, comes to be thus enlarged, it is perfectly manifest that, without some provision for this purpose, the principles of our constitution would not have been duly adjusted to the scene in which we have to act. Were we not so formed as eagerly to seize the resembling features of different things and different events, and to extend our conclusions from the individual to the species, life would elapse before we had acquired the first rudiments of that knowledge which is essential to our animal existence" (*q*). Every branch of knowledge presents instructive examples of the extent to which this mode of reasoning may be securely carried. Newton, from having observed that the refractive forces of different bodies follow the ratio of their

(*p*) Locke's Essay concerning Human Understanding, b. iv. ch. xv. s. 5.

(*q*) Stewart's Elements of the Philosophy of the Human Mind, vol. ii. ch. ii. s. iv.

densities, was led to predict the combustibility of the diamond ages before the mechanical aids of science were capable of verifying his prediction ; nor is the sagacity of the conjecture the less striking, because this correspondence has been discovered not to be without exception (*r*). The scientific observer, from the inspection of shapeless fragments, which have mouldered under the suns and storms of ages, constructs a model of the original in its primitive magnificence and symmetry. A profound knowledge of comparative anatomy enabled the immortal Cuvier, from a single fossil bone, to describe the structure and habits of many of the extinct animals of the antediluvian world. In like manner an enlightened knowledge of human nature often enables us, on the foundation of apparently slight circumstances, to follow the tortuous windings of crime, and ultimately to discover its guilty author, as infallibly as the hunter is conducted by the track to his game.

The following pertinent and instructive observations may advantageously close this part of our subject, comprehending, as they do, everything which can be usefully adduced in illustration of the necessity and value of the principle of analogy. “In all reasonings concerning human life we are obliged to depend on analogy, if it were only from that uncertainty, and almost suspension of judgment, with

(*r*) The perturbations of Uranus led astronomers, by a process of inference from the known interaction of ascertained planets upon one another, to believe in the existence of a planet outside the then known solar system long before the place of Neptune was calculated and itself discovered.

which we must hold our conclusions. We can seldom obtain that number of instances which is requisite here to establish an inference indisputably. The conduct of persons or of parties may have been attended by certain antecedents and certain results in the examples before us ; still the state of the case may be owing, not so much to that conduct, as to other causes, which are shut out of our view, when our attention is fixed on the particular examples adduced for the purpose of the inference. We must thus be strictly on our guard against transferring to other cases anything merely contingent and peculiar to the instances on which our reasoning is founded. And this is what analogical reasoning requires and enables us to do. If rightly pursued it is employed at once, both in generalising and discriminating ; in the acute perception at once of points of agreement and points of difference. The acme of the philosophical power is displayed in the perfect co-operation of these two opposite proceedings. We must study to combine in such a way as not to merge real differences ; and so to distinguish as not to divert the eye from the real correspondence" (s).

It may be objected, that the minds of men are so differently constituted, and so much influenced by differences of experience and culture, that the same evidence may produce in different individuals very different degrees of belief ; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that moral certainty

(s) Hampden's Lectures on Moral Philosophy, 178.

has not one fixed and unvarying standard, the same for every individual ; that scepticism and credulity are modifications of the same principle, and that to a certain extent this objection is grounded in fact ; but, nevertheless, the psychological considerations which it involves have but little alliance with the present subject ; the argument, if pushed to its extreme, would go to introduce universal doubt and distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions ; but in the one case, as well as in the other, there is a general agreement and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, not what may be the *possible* effect of evidence upon minds *peculiarly* constructed, but what ought to be its fair result with men, such as the generality of civilized men are.

It is of no moment, in relation to criminal jurisprudence, that exact expression cannot be given to the inferior degrees of belief. The doctrine of chances, and nice calculations of probabilities, cannot, except in a few cases, and then only in a very general and abstract way, be applied to human actions, which are essentially unlike, and dependent upon peculiarities of persons and circumstances which render it impossible to assign to them a precise value, or to compare them with a common numeral standard ; nor are they capable in any degree, or under any circumstances, of being applied to actions which

infer legal responsibility. In the common affairs of life, men are frequently obliged, from necessity and duty, to act upon the lowest degree of belief; and, as Locke justly observes, "He that will not stir, till he infallibly knows the business he goes about will succeed, will have little else to do but to sit still and perish" (1). But in such cases our judgments commonly concern ourselves, and our own motives, duties, and interests; while in the administration of penal justice, the magistrate is called upon to apply to the conduct of *others*, a rule of action applicable to a given state of facts, where external and sometimes ambiguous indicia alone constitute the grounds of judgment. In the application of every such rule, the certainty of the facts is presupposed, and is its only foundation and vindication; and upon any lower degree of assurance, its application would be arbitrary and indefensible.

(1) Essay concerning Human Understanding, b. iv. ch. xiv. s. 1.

## AMERICAN NOTES.

[NOTE TO CHAPTER I.]

### *"Evidence" Defined.*

"Evidence" means — "1. Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called evidence. 2. Documents produced for the inspection of the Court or judge; such documents are called documentary evidence." Stephen's Dig. Evid. Art. 1. This author wholly ignores the distinction between direct and circumstantial evidence, treating the subject mainly from the standpoint of relevancy alone.

Mr. Thayer defines the term "evidence" as "any matter of fact which is furnished to a legal tribunal," regarding the definition of Stephen as too narrow in that it excludes matters of fact demonstrated to the senses of the judge (Cases on Evidence, p. 2). An instance of evidence not included in the definition of Stephen, but embraced by Mr. Thayer's definition, occurs in *Brown v. Foster*, 113 Mass. 137, where, in a controversy over the fit of a coat, the coat is put on.

"The word 'evidence,' in legal acceptation, includes all means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." Greenleaf on Evid. § 1.

### *Testimony.*

The term "testimony" refers to evidence given by witnesses and excludes documentary evidence. *Dibble v. Dimmick*, 143 N. Y. 549, 554.

### *Positive and Negative Evidence.*

The evidence of one who did not hear a sound for which he was listening is positive. *L. S. & M. S. R. R. Co. v. Schade*, 15 Ohio Circ. Ct. 424, 57 Ohio St. 650; *C., C., C. & St. L. Ry.*

Richardson, 10 Circ. Dec. 326, 19 Ohio Circ. Ct. 385 (locomotive bell or whistle).

Positive evidence is generally superior to negative. *Boyd v. Sell, Tappan (Ohio)*, 43; *Toledo Consol. St. Ry. v. Roehner*, 6 Circ. Dec. (Ohio) 706, 9 Ohio Circ. Ct. 702, 57 Ohio St. 667.

On the question of notoriety, if witnesses have equal opportunities for knowing the facts negative evidence is entitled to full weight. *McArthur v. Phoebus*, 2 Ohio, 415, 426.

Positive evidence of a fact is entitled to greater weight than negative evidence against it. *Urias v. Penn. R. Co.*, 152 Pa. 326; *Floyd v. Phila. & R. R. Co.*, 162 Pa. 29.

### *Relevancy.*

"Facts not otherwise relevant are relevant — (1) If they are inconsistent with any fact in issue or relevant fact; (2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable." *Stephen's Dig. Evid.*, Appendix, Note 1. This rule would justify the admission of circumstantial evidence of facts from which the facts in issue are to be inferred.

In earlier editions Stephen had defined relevant facts as follows: "Facts, whether in issue or not, are relevant to each other when one is, or probably may have been — the cause of the other; the effect of the other; an effect of the same cause; a cause of the same effect; or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any other fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other."

A fact may be admissible in connection with other facts forming a chain, even though standing alone it would afford no reasonable ground for inference.

"If it would be relevant when taken in connection with other facts, it ought to be proposed in connection with those facts, and an offer to follow the evidence proposed with proof of those facts at the proper times. Dislocated circumstances may doubtless be given in evidence; particularly if there be no objection to the order of time; but the proposal of the evidence must contain in itself, by

reference to something that has preceded it, or that is to follow information of the manner in which the evidence is to be legitimately operative." *Weidler v. Bank*, 11 S. & R. (Pa.) 139.

"Whatever is not of a nature to beget mental conviction upon the point under inquiry is irrelevant evidence and should not be admitted; whatever is of that nature should be admitted. And of this moral quality of proofs the presiding judge is the arbiter; he admits and rejects, under our supervision, according to his estimate (not of the effect of the evidence, for that is for the jury), but according to his estimate of the fitness of the evidence to conduct human reason to a sound conclusion on the point in question." *Stauffer v. Young*, 39 Pa. St. 460.

*"Conclusive Proof" Defined.*

"Conclusive Proof" means "evidence upon the production of which the judge is bound by law to regard some facts as proved, and to exclude evidence intended to disprove it." Stephen's Dig. Evid. Art. 1.

*All Facts prima facie Admissible.*

"Unless excluded by some rule or principle of law, all that is logically probative is admissible." Thayer's Preliminary Treatise on Evidence, p. 265.

*Nature of the Assurance Produced by Different Kinds of Evidence.*

*Evidence need not be conclusive.* — One may testify as to spots of blood on the clothes of a prisoner accused of murder without calling for a chemical analysis. *People v. Fernandez*, 35 N. Y. 49.

Testimony is not to be ruled out as irrelevant because it does not at once establish the whole issue. If not followed up by connecting proof, the adverse party may request the Court to direct the jury to disregard it. *Murphy v. Boker*, 3 Rob. (N. Y.) 1, 28 How. Pr. 251; *Polhamus v. Moser*, 7 Rob. (N. Y.) 489.

Inferences may be drawn by the jury if they be reasonable and probable; they need not be necessary inferences. *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147.

*Test of Admissibility of Circumstances.*

"It is sometimes difficult to mark with precision the line which separates the limits of just and reasonable inference from those of mere conjecture or surmise. This arises necessarily from the nature of indirect evidence. Being founded on the observation and experience of the mutual connection between facts and circumstances, the question of its competency is easy or difficult of solution according as such supposed connection is constant or more or less regular and frequent. But as a safe practical rule it may be laid down that in no case is evidence to be excluded of any fact or circumstances, connected with the principal transaction, from which an inference to the truth of a disputed fact can reasonably be made." *Com. v. Jeffries*, 7 Allen (Mass.), 548.

"But yet the competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. Indeed, to require a necessary relation between the fact known and the fact sought would sweep away many sources of testimony to which men daily recur in the ordinary business of life; and that cannot be rejected by a judicial tribunal without hazard of shutting out the light." *Stevenson v. Stewart*, 11 Pa. 308.

*The Assurance Produced by Circumstantial Evidence is in its Nature Sufficient.*

If absolute certainty were required it would be necessary to exclude testimonial evidence and even open confessions, as well as circumstantial evidence. As said by Justice Story in *U. S. v. Gibert*, 2 Sumner (U. S.), 19, 28: "It is not even certain that criminals who, in capital cases, plead guilty, and, by confession of their guilt in open court, submit to the sentence of the law, are always guilty of the offence. Cases have occurred in which men have been accused and tried, and convicted of murder, upon their own solemn confession in a court of justice; when it has been afterwards ascertained that the party could not have been guilty; for the person supposed to be murdered was found to be still living

or lost his life at another place, and at a different period. And yet it never has been supposed that a solemn confession in open court was not a just ground to believe the guilt of the party accused. But to what conclusion does this tend? Admitting the truth of such cases, are we then to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice."

That it is possible by means of circumstantial evidence to prove the guilt of the accused beyond a reasonable doubt, as that term is understood in the law, is indicated by Chief Justice Shaw in *Com. v. Webster*, 5 Cush. (Mass.) 259, 319. "It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should, to a moral certainty, exclude every other hypothesis. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether." And would exclude, it might be truthfully added, testimonial evidence also.

In *Gibson v. Hunter*, 2 H. Bl. 298, the argument of counsel for the admission of certain evidence, which the Court admitted, was as follows: "The defendant in error humbly submits that it is competent to a jury to find matters of fact without direct or positive testimony of those facts and upon circumstantial evidence only, although the inference or conclusion to be drawn from the circumstances proved be not absolutely certain or necessary; that it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried; and if the evidence has that tendency it ought to be received and left to the consideration of the jury, to whom alone it belongs to determine

upon the precise force and effect of the circumstances proved, and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue."

*Motive Unnecessary.*

Circumstantial evidence may be sufficient upon which to convict defendant of assault with intent to kill even though no motive whatever be shown. *Sterling v. State*, 89 Ga. 807.

*Moral Evidence.*

Moral evidence is evidence sufficient to induce a belief upon which men would act in their own affairs. *Babcock v. Fitchburg R. R. Co.*, 140 N. Y. 308, 311.

"None but mathematical truth is susceptible of that high degree of evidence called *demonstration*, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone; by which is meant not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition or from demonstration. In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them. The true question, therefore, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence are said to be proved." *Greenleaf on Evid.* § 1.

*Experience the Basis.*

"The logic upon which circumstantial evidence is based is this: We know from our experience that certain things are usual concomitants of each other. In seeking to establish the existence of one, where the direct proof is deficient or uncertain, we prove the certain existence of the co-relative fact, and thus establish,

with more or less certainty, according to the nature of the case, the reality of the principal fact." *People v. Kennedy*, 32 N. Y. 141, 145.

*Doubts as to Reliability of Experience.*

In 1 Taylor on Evidence, § 66, it is said, "Throw a case of circumstantial evidence into the form of a syllogism, and it will be found that the major premise rests solely on the erring experience of the tribunal to whom it is presented."

And Lord Bacon maintains that there is a natural tendency in the human mind to suppose a greater order and conformity in things than actually exist. *Novum Organum*, aphor. 45.

*Order of Introducing Evidence.*

If a circumstance tends to make a material fact more or less probable, it is admissible, and the order in which such circumstances may be introduced is largely in the discretion of the party introducing them. *Johnson v. Com.* 115 Pa. St. 369.

*Weight of Evidence Required.*

It is sometimes said that circumstantial evidence must be equal in weight to the testimony of one credible witness, but there is no such rule in the common law. *State v. Norwood*, 74 N. C. 247.

But by statute it is sometimes provided that "no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses, or that which is equivalent thereto." See *State v. Kelly*, 77 Conn. 266, 274.

*Circumstantial Evidence is Admissible to Prove Relevant Facts even though they be not Facts in Issue.*

Courts have very frequently said that where the *factum probandum* is to be established by circumstantial evidence, those circumstances from which the inference is to be made must be proved by direct evidence. See *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625; *Binns v. State*, 66 Ind. 428; *U. S. v. Ross*, 92 U. S. 281, 3 Encyc. Evidence, 70. And see for criticism of the doctrine, Wigmore on Evidence, § 41.

But the statement cannot be strictly true. The fact that the defendant made a plan to commit the crime charged, is every-

where admissible in evidence against him, and where the parties have not themselves confessed to having such a plan, the fact must necessarily be proved by the surrounding circumstances. The facts that defendant bought a gun and that he thereupon lay in wait for another are facts from which may be inferred his plan to commit a crime, and his having such a plan is a fact from which his guilt may be inferred.

This is an inference from an inference, and yet courts universally admit such evidence.

It is sometimes said that the facts from which an inference is to be drawn must not themselves be uncertain, but must be proved by direct evidence. But certainty and proof by direct evidence are two different things. It is true that the jury ought not to be allowed to draw an inference from facts that are too uncertain to be a reasonable basis for any inference, but this is just as likely to be the case where those facts are sought to be proved by direct evidence as by indirect.

The rule may, however, be given a meaning that is very obviously true. We cannot draw an inference until we have something from which to infer, and although we can draw an inference from the fact which is itself inferred, the fact that is the starting point of our chain of inferences must be proved by other evidence than circumstantial.

Furthermore, courts are justified in excluding evidence of facts on the ground that they are too remote and require too many inferences before arriving at the *factum probandum*. See *State v. Kelly*, 77 Conn. 266.

That the circumstances from which the guilt of the defendant is to be inferred may themselves be established by circumstantial evidence, is held in *State v. Smith*, 102 Iowa, 656, 663, where in order to prove the defendant guilty of poisoning her husband an effort was made to show that she previously shot him. The Court says: "The appellant does not deny, but admits, that acts, conduct, threats, declarations, and statements of a person accused of crime, which occurred before it was committed, are admissible to show a motive or intent, but urges that, to be competent, the evidence must be direct, and not circumstantial. We are not aware that the authorities make the distinction urged, and do not think there is any sufficient ground upon which to base it. If a

prior act or declaration may be proved as tending to show the guilt of a person accused of crime, we are of the opinion that it may be shown by any evidence competent to prove the act if it were directly in issue, whether such evidence be positive and direct, or circumstantial only." The illustration given in *Bradshaw v. State*, 17 Neb. 147, to show that where there are many circumstances from which an inference may be drawn, it may be sufficiently established even though some of those circumstances be disbelieved, also illustrates that guilt may be inferred from facts themselves inferred. The Court says, supposing a case of wife murder: "All the circumstances of the case point with almost absolute certainty to his guilt. The jury are satisfied of it beyond a reasonable doubt. He is proved to be devoid of affection for her, has been seen to cruelly maltreat her. His conduct toward another woman establishes the fact that she has supplanted his wife in his affection. The poison has been found in the body of the deceased in a sufficient quantity to produce death. He is shown to have recently purchased the same kind of poison for the alleged purpose of destroying a family dog which has been permanently injured, but which he wishes to kill without pain. It is shown he had no dog, and none had been injured. He had but recently caused the life of his wife to be heavily insured. He had been heard to make threats and insinuations which, in the light of subsequent events, show that he intended and confidently expected her death at an early day. A witness is called for the prosecution who testifies that at a particular time he saw the accused in the company of the other woman under circumstances of very questionable propriety, and which, if believed, would establish illicit intercourse between them. This last fact is 'relied' upon as a 'link in the chain of circumstances' to establish the fact of his guilt of the crime charged. The jury are fully satisfied of his guilt, but from the conduct or demeanor of the witness, or from some other cause, do not believe the story of the illicit intercourse. Must they therefore find the accused not guilty? Clearly not."

Here maltreatment argues lack of affection, lack of affection argues a desire to be rid of the wife, the desire to be rid of her argues that he killed her. Again, his false purpose in buying the poison argues the existence of another purpose which he desired to conceal, hence it must have been an evil purpose, it may have

been a purpose to kill his wife, and hence if he may have had the purpose he may have killed her. Again from the fact of illicit intercourse with another it cannot be inferred *directly* that he killed his wife, but it may be the basis of a chain of inference to this end.

In *State v. Kelly*, 77 Conn. 266, 271, it is said, in excluding certain testimony that the deceased had been despondent some months before her death and exhibited no desire to live: "The Court was plainly justified in excluding this testimony as too remote. If it could serve any useful purpose it would be in creating an inference of the harboring of a purpose to take life to use in drawing another inference that she did so. Evidence for the purpose of creating an inference of the fact upon which to base an inference of another fact is generally inadmissible. It is too remote."

But the Court itself in this opinion intimates that such evidence is admissible when nearer in point of time, though in such case the double inference would be just as necessary. See *Com. v. Trefethen*, 157 Mass. 180.

Circumstantial evidence is admissible if it tends to establish any material fact, even though it does not tend to establish the guilt of the defendant. *State v. Reno*, 67 Iowa, 587.

Where a motive on the part of the defendant may be inferred from his acts or statements before the event, such acts or statements may be proved by circumstantial evidence. *State v. Smith*, 102 Iowa, 656.

#### *Evidence too Remote.*

That evidence otherwise relevant may be excluded because too remote is laid down as follows in Art. 2, Stephen's Dig. Evid.: "Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."

And commenting upon this in *State v. Kelly*, 77 Conn. 266, 269, the Court says, "This general principle finds its frequent expression in such statements as that matter likely to mislead the jury, or to be misused by it, or to unnecessarily complicate a case, or of slight, remote, or conjectural significance, ought not to be admitted."

In Thayer's Cases on Evidence, 229, it is said: "Remoteness as

applied to evidence is a term which has regard for other factors than mere lapse of time, even where it is a factor, as it often is not. The essence of remoteness is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in proof of the latter. . . . Generally speaking, the question of remoteness, as justifying the exclusion of evidence, must depend upon all the considerations, including time, the character of the evidence, and all the surrounding circumstances which in the opinion of the Court ought to have a bearing upon its worthiness to be brought into the consideration and determination of the matter in contention."

Rules of law ought not to be so artificial as to shut out proof of any circumstance, even though it be remote, which may assist in determining guilt or innocence. *Johnson v. State*, 14 Ga. 55.



## CHAPTER II.

### CIRCUMSTANTIAL EVIDENCE.



#### SECTION I.

##### ESSENTIAL CHARACTERISTICS OF CIRCUMSTANTIAL EVIDENCE.

THE epithets DIRECT and INDIRECT or CIRCUMSTANTIAL, as applied to testimonial evidence, have been sanctioned by such long and general use, that it might appear presumptuous to question their accuracy, as it would perhaps be impracticable to substitute others more appropriate. But assuredly these terms have frequently been very indiscriminately applied, and the misuse of them has occasionally been the cause of lamentable results; it is therefore essential accurately to discriminate the proper application of them.

On a superficial view, direct and indirect or circumstantial, would appear to be *distinct* species of evidence; whereas, these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence; the distinction is, that by DIRECT EVIDENCE is intended evidence which applies directly

to the fact which forms the subject of inquiry, the *factum probandum*; CIRCUMSTANTIAL EVIDENCE is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred. A witness deposes that he saw A. inflict on B. a wound, of which he instantly died; this is a case of direct evidence. B. dies of poisoning; A. is proved to have had malice and uttered threats against him, and to have clandestinely purchased poison, wrapped in a particular paper, and of the same kind as that which has caused death; the paper is found in his secret drawer, and the poison gone. The *evidence* of these facts is *direct*; the facts themselves are *indirect* and *circumstantial*, as applicable to the inquiry whether a murder has been committed, and whether it was committed by A.

So rapid are our intellectual processes, that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment, and the train of reasoning of which it is the result; and the one appears to succeed the other instantaneously, by a kind of necessity. This fact obtains most commonly in respect of matters which have been frequently the objects of mental association.

In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to come to a decision upon circumstantial

evidence, the judgment in respect of which is essentially *inferential*. There is no apparent necessary connection between the facts and the inference; the *facts* may be true and the *inference* erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy. The word "presumption," *ex vi termini*, imports an *inference* from facts; and the adjunct "presumptive," as applied to evidentiary facts, *implies* if not the certainty at least the great probability of some *relation* between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*. But this is a part of the subject which will more appropriately admit of amplification in a future part of this essay.

## SECTION 2.

## PRESUMPTIONS.

IT is essential to a just view of our subject that our notions of the nature of PRESUMPTIONS should be precise and distinct. A PRESUMPTION is a probable consequence, drawn from facts (either certain, or proved by direct testimony), as to the truth of a fact alleged, but of which there is no direct proof. It follows, therefore, that a presumption of any fact is an inference of that fact from others that are known (*a*). The word "presumption," therefore, inherently imports an act of reasoning,—a conclusion of the judgment; and it is applied to denote such facts of moral phenomena, as from experience we know to be invariably or commonly connected with some other related fact (*b*). A wounded and bleeding body is discovered; the pockets are empty and have the appearance of having been rifled; wide and deep footmarks are found in a direction proceeding from the body; or a person is seen running from the spot. In the one case are observed marks of flight, in the other is seen the fugitive, and we know that guilt naturally endeavours to escape detection. These circumstances induce the presumption that crime has been committed; the presumption is a conclusion or consequence from the circumstances. The antecedent circumstances

(*a*) Per Abbott, C. J., in *Rex v. Burdett*, 4 B. & Ald. 161.

(*b*) In strictness the presumption is rather the link which experience tells us is found to exist between certain facts and certain other facts, but it is so commonly used to denote not so much the process or method of connection as the conclusion itself, that this passage and many others have been left as in the original.

therefore are one thing, the presumption from them another and different one. Of presumptions afforded by moral phenomena, a memorable instance is recorded in the Judgment of Solomon, whose knowledge of the all-powerful force of maternal love supplied him with an infallible criterion of truth (*c*). So, when Aristippus, who had been cast away on an unknown shore, saw certain geometrical figures traced in the sand, his inference that the country was inhabited by a people conversant with mathematics was a presumption of the same nature (*d*). It is evident that this kind of reasoning is not peculiar to legal science, but is a logical process common to every subject of human investigation.

All presumptions connected with human conduct are inferences founded upon the observation of man's nature as a sentient being and a moral agent ; and they are necessarily infinite in variety and number, differing according to the diversities of individual character, and to the innumerable and ever-changing situations and emergencies in which men are placed. Hence the importance of a knowledge of the instincts, affections, desires, and moral capabilities of our nature, to the correct deduction of such presumptions as are founded upon them, and which are therefore called NATURAL PRESUMPTIONS (*e*).

LEGAL PRESUMPTIONS are founded upon natural presumptions, being such natural presumptions as

(*c*) Domat's Civil Law, b. iii. tit. 6, s. 4, § 6.

(*d*) Gambier's Introduction to the Study of Moral Ev. 55.

(*e*) 3 Mascardus De Probationibus, Conclusio MCCXXVI.

are connected with human actions so far as they are authoritatively constituted by the legislator or deduced by the magistrate.

The civilians divided legal presumptions into two classes, namely, *præsumptiones juris et de jure*, and *præsumptiones juris* simply.

Presumptions of the former class were such as were considered to be founded upon a connection and relation so intimate and certain between the fact known and the fact sought, that the latter was deemed to be an infallible consequence from the existence of the first. Such presumptions were called *præsumptiones juris*, because their force and authority were recognized by the law ; and *de jure*, because they were made the foundation of certain specific legal consequences (*f*), against which no argument or evidence was admissible ; while *præsumptiones juris* simply, though deduced from facts characteristic of truth, were always subject to be overthrown by proof of facts leading to a contrary presumption.

In matters of property, the principal modifications of which are matters of positive institution, the laws of every country have created artificial legal presumptions, grounded upon reasons of policy and convenience, to prevent social discord and to fortify private right. The justice and policy of such regulations have been thus eloquently enforced : " Civil cases regard property : now, although property itself

(f) Menochius De Præsumptionibus, lib. i. q. 3.

is not, yet almost everything concerning property, and all its modifications, is of artificial contrivance. The rules concerning it become more positive, as connected with positive institutions. The legislator therefore always, the jurist frequently, may ordain certain methods, by which alone they will suffer such matters to be known and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. Men act on them with all the power of a creator over his creatures. They make fictions of law and presumptions of law (*præsumptiones juris et de jure*) according to their ideas of utility—and against those fictions, and against presumptions so created, they do and may reject all evidence” (g).

But in penal jurisprudence, man as a physical being and a moral agent, such as he is by natural constitution and by the influences of social condition, is the subject of inquiry. Punitive justice is, for the most part, applied to injurious actions proceeding from malignity of purpose, and not to physical actions merely. It has been said with great force and accuracy, that “where the subject is of a physical nature, or of a moral nature, independent of their conventions, men have no other reasonable authority than to register and digest the results of experience and observation”; and that “the presumptions which belong to criminal cases are those natural

(g) *Burke's Works*: Report from the Committee of the House of Commons appointed to inspect the Lords' Journals in relation to their proceeding in the trial of Warren Hastings, Esquire, under heading “Circumstantial Evidence.” Ed. Rivington, 1822, vol. xiv. p. 397.  
3 *Mascardus De Probationibus*. Conclusio MCCXXVIII.

and popular presumptions which are only observations turned into maxims, like adages and apophthegms, and are admitted (when their grounds are established) in the place of proof, where better is wanting, but are to be always overturned by counterproof" (*h*). Hence therefore a third class of presumptions, which the civilians called *presumptiones hominis*, because they were inferred by the sagacity and discretion of the judge from the facts judicially before him. Such presumptions are in fact natural presumptions simply, deriving their force from that relation and connection which are recognized and acknowledged by the unsophisticated reason of all observing and reflecting men.

Presumptions of every kind, to be just, must be dictated by nature and reason; and, except under special and peculiar circumstances, it is impossible, without a dereliction of every rational principle, to lay down positive rules of presumption, where every case must of necessity be connected with peculiarities of personal disposition and of concomitant circumstances, and be therefore irreducible to any fixed principle. In criminal jurisprudence, therefore, arbitrary presumptions should be sparingly admitted, and even when they are so, they occasionally work injustice. On the conviction of the captain of a schooner for having naval stores in his possession, Mr. Baron Alderson, in passing sentence of six months' imprisonment, said that he was satisfied the

(*h*) Burke's Works: see reference p. 25, *supra*. See p. 399 of edition there cited. 3 Mascardus De Probationibus, Conclusio MCCXXVIII.

prisoner had become possessed of the stores in ignorance of the Act of Parliament, but that it was of the greatest importance that its provisions should be generally known, and expressed his hope that his good character would operate to obtain a mitigation of the sentence (*i*). It would be as unreasonable to subject human actions to unbending rules of presumption, as to prescribe to the commander of a ship inflexible rules for his conduct, without any latitude of discretion in the unforeseen and innumerable accidents and contingencies of the tempest and the ocean. Where a peremptory presumption of legal guilt is not pernicious and unjust, it is in general at least unnecessary ; for, if it be a fair conclusion of the reason, it will be adopted by the tribunals, without the mandate of the legislature. There may, no doubt, be cases, where the provisions of the law are peculiarly liable to be defeated or evaded by subtle contrivances and shifts most difficult of prevention. But, even in such cases, legal presumptions can only be justifiable where the proximate fact from which the presumption is made to flow is clearly of a guilty character and tendency *per se*, and would afford, even in the absence of legal enactment, a strong moral ground of presumption indicative of the particular act of criminality intended to be repressed (*k*) ; and however explicit and exclusive may be the language of the legislature, the tribunals must by an inherent necessity give effect to all such surrounding circumstances as tend to repel or

(*i*) *Reg. v. Trannock*, Liverpool Winter Ass. 1848.

(*k*) *Traité des Preuves*, par Bonnier, 2nd ed. 1852, p. 702, § 752.

modify the particular presumption, or to create a counter-presumption of equal or superior weight (*l*). It is impossible to recall without something akin to horror the law (*m*) which made the concealment of the death of an illegitimate child by its mother, conclusive evidence of murder, unless she could make proof, by one witness at least, that the child was born dead, which too long disgraced our statute-book; whereas in truth it affords no ground to warrant such a conclusion, since it is more natural and more just to attribute the suppression to a desire to conceal shame and to escape dishonour.

Modern legislation has introduced a large class of offences, where the only suggestion of moral guilt lies in the fact of disobedience to the law. Offences against building acts and byelaws for the regulation of towns and other communities are typical examples. There is no room in such cases for any presumption. Legislation says that such a thing shall or shall not be done, and affixes a penalty to noncompliance with the enactment. That is all.

As evidentiary circumstances and their combinations are infinitely varied, so also are the presumptions to which they lead; and a complete enumeration would in either case be impracticable. The writers on the civil law have made a comprehensive and instructive collection of facts and inferential conclusions, in relation to a vast number of actions connected

(*l*) See *infra*, ch. iii. s. 8, pp. 128, 130.

(*m*) Stat. 21 Jac. I. c. 27, now repealed. See *infra*, ch. vii. s. 5, sub-s. 3, p. 356.

with legal accountability. But many things advanced by those laborious and elaborate authors have relation to a state of society, and to legal institutions and modes of procedure, wholly dissimilar from our own. The law of England admits of no such thing as the *semi-plena probatio*, founded on circumstances of conjecture and suspicion only, which in many countries governed by the Roman law, was held to warrant the infliction of torture with a view to compel admissions and complete imperfect proof. Hence the total inapplicability with us of the subdivisions of *indicia*, *signa*, *adminicula*, *conjecturæ*, *dubia*, and *suspiciones*, which are found in the writers of other countries whose jurisprudence is founded upon that of Rome—subdivisions which appear to be arbitrary, vague, and useless. But it is manifest that, under legal institutions which admitted of compulsory self-accusation, in order to complete proof insufficient and inconclusive in itself, and where the laws were administered by a single judge, without the salutary restraints of publicity and criticism, an accurate and elaborate record of the multitudinous actions and occurrences which had been submitted to the criminal tribunals, operated as an important limitation upon the tyranny and inconstancy of judicial discretion.

It is calculated to excite surprise, that arbitrary technical rules should ever have been adopted for estimating the force and effect of particular facts as leading to presumptions ; a matter purely of reason and logic. It is probable, nevertheless, that the attempt originated in the desire to escape a still

greater absurdity. "*Testis unus, testis nullus*," "*unus testis non est audiendus*," were fundamental maxims of the text-writers on the Civil and Canon Laws, and of most ancient codes (*n*), as they still are of judicial procedure in many parts of Europe (*o*). Since presumptions have not the same force as direct evidence, it was supposed to be required, as a logical sequence, that there should be a concurrence of three presumptions, as the imaginary equivalent for the testimony of two ocular witnesses, where such testimony was not to be had. It is discreditable to the state of moral and legal science that these absurd and antiquated notions, worthy of the darkest ages of society, should have been countenanced and perpetuated in the legislation of several of the nations of Europe even in modern times (*p*). It is obvious that a single presumption may be conclusive, and that an accumulation of many presumptions may be of but little weight. The simplest and most elementary dictates of common sense require that presumptions should not be numbered merely, but that they should be weighed according to the principles which are applied in estimating the effect of testimonial evidence.

In this connection we may remember what a distinguished historian has said : "It can by no means be laid down as a general maxim that the assertion

(*n*) Deut. xvii. 6, xix. 15 ; Numb. xxxv. 30 ; 4 Michaelis Commentaries on the Laws of Moses, by Smith, Art. ccxcix. "of Witnesses."

(*o*) Code Hollandais, 1838 ; Code Pénal d'Autriche ; Code de Bavière, and many other German Codes.

(*p*) Code Criminel de Prusse, 1805 ; Code de Procédure Criminelle d'Autriche, 1853 ; ditto de Modène, 1855.

of two witnesses is more convincing to the mind than the assertion of one witness. The story told by one witness may be in itself probable. The story told by two witnesses may be extravagant. The story told by one witness may be uncontradicted. The story told by two witnesses may be contradicted by four witnesses. The story told by one witness may be corroborated by a crowd of circumstances. The story told by two witnesses may have no such corroboration. The one witness may be a Tillotson or Ken. The two witnesses may be Oates or Bedloe" (*q*).

The prevalence of these fallacious methods of judging of the force of evidence, explains the foundation of the practice, abhorrent alike to justice and common sense, of condemning to a minor punishment persons who may be innocent, but against whom there may exist apparent grounds of strong presumption, though not that exact kind and amount of proof which the rules of evidence arbitrarily and unreasonably require; as if a middle term in criminal jurisprudence were not absurd and self-contradictory (*r*). An eminent foreign jurist well remarks, that, "Jamais il n'y a eu plus de condamnations injustes que sous l'empire d'une jurisprudence qui défendait de prononcer la peine capitale sur de simples indices" (*s*).

(*q*) Macaulay, History of England, ch. xxii.

(*r*) See several such cases in Narratives of Remarkable Criminal Trials, translated from the German of Feuerbach, by Lady Duff Gordon. A Berne, in 1842, a man accused of murder by poisoning was sentenced to six years' imprisonment, as *véhémentement suspect*.

(*s*) Bonnier, Traité des Preuves, 2nd ed. 1852, p. 677, § 719.

The unreasonable stress, which in many countries whose criminal procedure is derived from the Civil Law, is laid upon the confession of the accused, and the unwarrantable means which are resorted to in order to obtain it, are the natural results of arbitrary and unphilosophical rules of evidence, which necessarily have the effect of closing many of the channels of truth; and frequently render it so difficult to obtain full legal proof of crime, that Anselm von Feuerbach, who was an eminent continental jurist and criminal judge, declared, many years ago, that unless a man chose to perpetrate his crimes in public, or to confess them, he need not fear a conviction (*t*).

Attempts have been made by our own juridical writers, but with no useful result, to classify presumptions in a more general way under terms expressive of their effect, as VIOLENT or NECESSARY, PROBABLE or GRAVE, and SLIGHT (*u*). But this arrangement is specious and fanciful rather than practical and real; nor is it entirely accurate, since a presumption may be violent and yet not necessary (*v*). A more precise and intelligible classification of presumptions is into, violent or strong, and slight. But it is impossible thus to classify more than a

(*t*) See *Edinburgh Review*, lxxxii. (1845) at p. 330, and see in Christison on Poisons, 4th ed. p. 68, a German case where the crime of murder by poisoning was considered as not fully proved because the prisoner would not confess, but on account of the strong probability of his guilt he was condemned to fifteen years' imprisonment.

(*u*) Bentham's *Rationale of Judicial Evidence*, b. i. c. vi. s. 5; Coke on Litt. 6 b.; 3 Blackstone's Comm. b. vii. p. 371.

(*x*) See Menochius *De Præsumptionibus*, lib. i. q. 3, nos. 1, 2, 3; *Essai des Preuves*, par Gabriel, 373; Best on Presumptions (1844), §§ 30 and 31, p. 37.

comparatively few of the infinite variety of circumstances connected with human actions and motives, or to lay down rules for distinguishing presumptions of one of these classes from those of another; and the terms of designation, from the inherent imperfections of language, although not wholly destitute of utility, are unavoidably defective in precision. We can therefore only usefully apply these epithets as relative terms; and the effect of particular facts must of necessity depend upon the reality and closeness of the connection between the principal and secondary facts, and upon a variety of considerations peculiar to each individual case, and can no more be predicated than the boundaries can be defined, of the separate colours which form the solar spectrum.

It is convenient, and may be advantageous even, in order to obtain a comprehensive view of the tendencies and effect of a number of circumstances, to group them together in their chronological relation to the *factum probandum*, as ANTECEDENT, CONCOMITANT, and SUBSEQUENT; but to require the concurrence of these several kinds of presumption, as in the Bavarian criminal code of 1813, is an outrage upon all legal and philosophical principle (*y*).

By various statutes, many acts are made legal presumptions of guilt, and the onus of proving any matter of defence is expressly cast upon the party accused; but, with these exceptions, the truth of every accusation is determined by the voice of a

(*y*) Bonnier, *Traité des Preuves*, 2nd ed. 1852, p. 683, § 727; *Traité de la Preuve*, par Mittermaier (traduit par Alexandre), c. 61.

tribunal, upon consideration of the intrinsic and independent merits of each particular case, acting upon those principles of reason and judgment by which mankind are governed in all other cases where the same intellectual process is called into exercise, unfettered by any obligatory and inflexible presumptions. The inexpediency and inefficacy of positive presumptions, as indications of the criminality of intention, in which alone consists the essence of legal guilt, have been thus exposed with equal force and elegance by the hand of a master :—"The connection of the intention and the circumstances, is plainly of such a nature, as more to depend on the sagacity of the observer than on the excellency of any rule. The pains taken by the civilians on that subject have not been very fruitful ; and the English law-writers have, perhaps as wisely, in a manner abandoned the pursuit. In truth, it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence" (z).

### SECTION 3.

#### RELATIVE VALUE OF DIRECT AND INDIRECT OR CIRCUMSTANTIAL EVIDENCE (a).

THE foregoing observations naturally lead to a comparison of the relative value of Direct and Indirect or Circumstantial Evidence ; an inquiry which

(z) Burke's Works : for reference see p. 25, *supra*, at place there cited.

(a) The whole subject of this chapter is admirably discussed in Wharton on Criminal Evidence, 9th ed. 1884, ch. i.

becomes the more necessary, on account of some novel and questionable doctrines which have received countenance even from the judgment-seat.

The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence ; a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence. But language of a directly contrary import has been so often used by authorities of no mean note, as to have become almost proverbial, and to require examination.

It has been said that "circumstances are inflexible proofs. They will not bend to the inclinations of parties. Witnesses may be mistaken—may be corrupted ; things can be neither ; and therefore, so far as they go, deserve unlimited, unreserved faith" (*b*). "Circumstances," says Paley, "cannot lie" (*c*). It is astonishing that sophisms like these should have passed current without animadversion. The "circumstances" are assumed to be in every case established beyond the possibility of mistake ; and it is implied, that a circumstance established to be true possesses some mysterious force of its own, special in its nature and essence. Now, a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts, that they cannot lie ; for a fact cannot at the same time exist and not exist : so that in truth, the doctrine is merely the expression

(*b*) Burnett's Criminal Law of Scotland (1811), 523, footnote.

(*c*) Principles of Moral and Political Philosophy, b. vi. c. ix.

of a truism, that a fact is a fact. It may also be admitted that "circumstances are inflexible proofs," but assuredly of nothing more than of their own existence : so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked, that circumstances and facts of every kind must be proved by human testimony ; that although "circumstances cannot lie," the narrators of them may ; that, like witnesses of all other facts, they may be biassed or mistaken, and that the facts, even if indisputably true, may lead to erroneous inference. Thus far, then, circumstantial possesses no advantage over direct evidence.

A distinguished statesman and orator has advanced in unqualified terms the proposition, supported, he alleges, by the learned, that "when circumstantial proof is in its greatest perfection, that is when it is most abundant in circumstances, it is much superior to positive proof" (*d*). Paley has said, with more of caution, that "a concurrence of well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords" (*e*). Mr. Baron Legge, upon a trial for murder, after speaking of that "which the law calls a violent presumption," told the jury that "where a presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence,

(*d*) Burke's Works. For reference see p. 25, *supra*. See p. 402 of the edition there cited.

(*e*) Moral and Political Philosophy, b. vi. c. ix.

*because facts cannot lie*" (f). Mr. Justice Buller, in his charge to the jury in Donellan's case, said "that a presumption which *necessarily* arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part if not all of those circumstances" (g).

It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not accurately state the question, but implies a fallacy, and that extreme cases—the strongest ones of circumstantial, and the weakest of positive evidence—have been selected for the illustration and support of a general position. "A presumption which *necessarily* arises from circumstances" cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as *necessarily* to produce certainty and conviction, it matters not by what kind of evidence the effect is produced; and the intensity of the proof must be precisely the same,

(f) *Rex v. Blandy*, 18 State Trials, 1187. The italics are the author's.

(g) The trial of John Donellan, Esq., for the wilful murder of Sir Theodosius Boughton, Bart., at the Assize at Warwick, March 30th, 1781. Taken in shorthand by Joseph Gurney (London), 1781. The facts of this case are set out in detail below, in ch. vii. s. 4, pp. 324—330.

whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot, in any case, be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake.

Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the *anno-domini* water-mark usually contained in the fabric of writing-paper; and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind have occurred in the criminal and civil courts) that issues of paper have taken place bearing the water-mark of the year succeeding that of its distribution,—a striking exemplification of the fallacy of some of the arguments which have been remarked upon. How often has it been iterated in such cases, that circumstances are inflexible facts, and that facts cannot lie!

The proper effect of circumstantial, as compared with direct evidence, was more accurately stated by Lord Chief Baron Macdonald. "When circumstances connect themselves closely with each other, when they form a large and a strong body, so as to carry conviction to the minds of a jury, it MAY BE

proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart, by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concert a story, as to impose upon a jury by a fabrication of that sort, so that where it is cogent, strong and powerful where the witnesses do not contradict each other, or do not contradict themselves, it MAY BE evidence, more satisfactory than even direct evidence; and there are more instances than one where that has been the case" (*h*). In another case the same learned judge said, "Where the proof arises from the irresistible force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under *some circumstances* direct evidence MAY BE" (*i*).

But, in truth, direct and circumstantial evidence ought not to be placed in contrast, since they are not mutually opposed; for evidence of a circumstantial and secondary nature can never be justifiably resorted to, except where evidence of a direct and therefore of a superior nature is unattainable.

(*h*) *Rex v. Patch*, Surrey Spring Assizes, 1806. Several contemporary reports are to be found. The facts of the case are set out in detail below at p. 390.

(*i*) *Rex v. Smith*, for arson, Old Bailey, June 15th, 1813. Shorthand Report by Gurney.

The argument founded upon the abundance of the circumstances, and the consequent opportunities of contradiction which they afford, belongs to another part of the subject. While each of these incidents adds greatly to the probative force of circumstantial evidence in *particular* cases, they have clearly no connection with an inquiry into the value of circumstantial evidence in the *abstract*. However numerous may be the independent circumstances to which the witnesses depose, the result cannot be of a different kind from, or superior to, that strong moral assurance which is the consequence of satisfactory proof by direct testimony, and for which, if such proof be attainable, every tribunal, every reasonable mind would reject any attempt to substitute indirect or circumstantial evidence, as affording strong reason for suspicion and disbelief.

It has been said, that "though no doubt in most cases of circumstantial evidence there be a *possibility* that the prisoner may be innocent, the same often holds in cases of direct proof, where witnesses may err as to identity of person, or corruptly falsify, for reasons that are at the time unknown" (*k*). This observation is unquestionably true. Even the testimony of the senses, though it affords the safest ground of moral assurance, cannot be implicitly depended upon, even where the veracity of the witnesses is above all suspicion. An eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight.

(*k*) Burnett's Criminal Law of Scotland (1811), 524.

But it was proved by conclusive evidence, that the men on trial were, at the time of the robbery, at so remote a distance from the spot that the thing was impossible. The consequence was, that they were acquitted, and some time afterwards the robbers were taken, and the articles stolen found upon them. The prosecutor, on seeing these men, candidly acknowledged his mistake, and it is said gave a recompense to the persons he prosecuted, and who so narrowly escaped conviction(*l*). It is probable that he was deceived by the broad glare of sunlight, but there can be no doubt of the sincerity of his impressions.

Many similar instances are upon record of the fallibility of human testimony, even as to matters supposed to be grounded upon the clearest evidence of the senses, and where the misconception has related to the substantive matters of judicial inquiry. It has been said with the strictest philosophical truth, that "proof is nothing more than a presumption of the highest order"(*m*). But these considerations, instead of establishing the superior efficacy of circumstantial evidence, seem irresistibly to lead to the conclusion that it is, *a fortiori*, more probable that similar misconception may take place as to *collateral* facts and incidents, to which perhaps particular attention may not have been excited.

There is another source of fallacy and danger, to

(*l*) *Rex v. Wood and Brown*. This anecdote is told of Sir Thomas Davenport in 28 State Trials at col. 819; Ann. Reg. 1784.

(*m*) *Per* Lord Erskine in the Banbury Peerage Case, reported at length in Nicholas on Aduiterine Bastardy. See at p. 501.

which, as already intimated, circumstantial evidence is peculiarly liable, and of which it is necessary to be especially mindful. Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result ; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved,—frequently of a delicate and perplexing character,—liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature upon the true nature of things (*n*). Mr. Baron Alderson, upon a trial of this kind, said, “ It was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole ; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete ” (*o*).

It may be objected that the foregoing observations tend to create distrust in all human testimony. While it must be admitted that the senses cannot be im-

(*n*) *Novum Organum*, lib. i. Aph. 41, 45 ; Best on Presumptions (1844), p. 255 ; and see Bentham’s *Rationale of Jud. Ev.* b. v. c. xv. s. iv.

(*o*) *Reg. v. Hodges*, 2 Lewin, C. C. 227. The learned Baron’s remarks are taken from a MS. report of the time.

plicitly depended upon, it is certain that their liability to mistake may be greatly diminished by habits of accurate observation and relation. The general conformity of our impressions to truth and nature, and the universal opinion and practice of mankind, establish the reasonableness and propriety of our faith in testimonial evidence. The interest to which all controverted matters of fact give occasion, is a manifestation of the preference in the human mind of truth to falsehood : and, finally, the number of mistaken inferences from the testimony of the senses is inconceivably small, as compared with the almost infinite number of judgments which are correctly drawn from evidence of the kind in question.

#### SECTION 4.

##### OF THE SOURCES AND CLASSIFICATION OF CIRCUMSTANTIAL EVIDENCE.

IN the present state of knowledge there can be little danger of mistake as to the legitimate subjects of human belief ; but how melancholy is the picture of the human intellect exhibited in the records of superstition, imposture, and delusion, of enthusiasm and credulity, of judicial darkness and cruelty, in the pages of our own history, as well as in those of every other nation !

A profound ignorance of the laws of nature, an inability to account for the origin of evil, and to reconcile its existence with the Divine attributes, and the impulse to avenge wrongs for which human

institutions afforded no remedy, led to a universal belief in the supernatural interposition of the Supreme Being on behalf of his injured moral offspring. Of this persuasion, augury, divination, judicial combat, the various forms of trial by ordeal, the supposed intimations of truth conveyed by means of apparitions and dreams, the bleeding of a corpse in the presence of the murderer, and his reluctance to touch it (*p*), were thought to be so many manifestations; while, with the wildest inconsistency, the belief was equally general in the existence and influence of witchcraft and other modes of demoniacal agency over the minds and actions of men. The history of all nations affords lamentable memorials of judicial murders, the natural consequences of such mistaken and degrading views. Without adverting to other reasons, it is conclusive against all departure by the Supreme Being from the ordinary course of His administration, that so many instances of erroneous conviction and execution have occurred in all ages and in all countries.

The course of external nature, and the mental and physical constitution of man, and his actions and moral and mechanical relations, are the only sources of correct inference from those facts which constitute circumstantial evidence.

In every inquiry into the truth of any alleged fact, as to which the materials for our judgment are secondary facts, there must exist relations and dependencies,

(*p*) See *Rex v. Standsfield*, 11 St. Tr. at col. 1403; and *Rex v. Okeman*, 14 St. Tr. 1324.

inseparable from the principal fact, which will commonly be manifested by external appearances. No action of a rational being is indifferent or independent; and every such action must necessarily be connected with antecedent, concomitant, and subsequent conditions of mind, and with external circumstances of one kind or another, whether they be apparent or not.

A crime, so far as it falls within the cognizance of human tribunals, is generally, with the exceptions already pointed out (*q*), an *act* proceeding from a wicked *motive* (*r*); it follows, therefore, that in every such act there must have been one or more voluntary agents; that it must have had corresponding relations to some precise moment of time and portion of space; that there must have existed inducements to guilt, preparations for, and objects and instruments of crime; these—the acts of disguise, flight, or concealment, the possession of plunder or other fruits of crime, and innumerable other particulars connected with individual conduct, and with moral, social, and physical relations—afford materials for the determination of the judgment. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various

(*q*) See p. 28, *supra*.

(*r*) The author here and elsewhere uses the word “motive” to denote two things, which were frequently confused until Austin in his lectures on Jurisprudence (Lects. 12, 18, 19) taught that they should be distinguished, namely, *motive* and *intention*. A woman steals a loaf to save her own life and that of her starving child. The *motive*, preservation of self and offspring, is not wrong; it is the *intention* to take, without lawful justification, the property of another which makes the act criminal. The author has defined the word *motive* correctly at p. 48. Cf. p. 214–5, *infra*.

as the modifications and combinations of events in actual life. "All the acts of the party, all things that explain or throw light on these acts, all the acts of others relative to the affair, that come to his knowledge and may influence him ; his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences, and explanations ; his looks, his speech, his silence where he was called to speak ; everything which tends to establish the connection between all these particulars ;—every circumstance, precedent, concomitant, and subsequent, become parts of circumstantial evidence. These are in their matter infinite, and cannot be comprehended within any rule, or brought under any classification" (s).

Evidentiary facts of a circumstantial nature are susceptible only of a very general arrangement, into two classes ; namely, moral indications, afforded by the relations, and language and conduct of the party ; and, secondly, facts which are apparently extrinsic and mechanical, and independent of moral conduct and demeanour : and each of these classes may be further considered, as such facts are inculpatory or exculpatory. But this division is grounded upon the apparent rather than the real qualities of actions, and cannot be regarded as strictly accurate ; since all the actions of a rational agent are prompted by motives, and are therefore really moral indications, though it may not be always practicable to develop their moral relations.

(s) Burke's Works. For reference see p. 25, *supra*. See p. 400 of the edition there cited.

## AMERICAN NOTES

[NOTE TO CHAPTER II.]

### *Characteristics of Circumstantial Evidence.*

Circumstantial evidence is evidence of facts from which the existence of other facts may be inferred. *People v. Harris*, 136 N. Y. 423.

It is admissible both in civil and in criminal cases, and sometimes is the most convincing that can be had. *People v. Videto*, 1 Park. (N. Y.) 603; *People v. Davis*, 46 N. Y. St. R. 213, 9 N. Y. Crim. 334; affirmed, on opinion below, in 135 N. Y. 646.

It is not error to refuse to charge that direct evidence is always the most satisfactory. *People v. Johnson*, 140 N. Y. 350, 55 N. Y. St. R. 783.

In order to convict on circumstantial evidence, the facts must be such as to exclude every reasonable hypothesis except that of guilt; the jury must have no reasonable doubt of the essential facts. *Lowenstein's Trial*, p. 330; *Stephens v. People*, 4 Park. 396; affirmed in 19 N. Y. 549; *People v. Harris*, 136 N. Y. 423, 49 N. Y. St. R. 751; *People v. Kelly*, 11 App. Div. 495; appeal dismissed in 153 N. Y. 651; *People v. Fitzgerald*, 156 N. Y. 253 (reversing 20 App. Div. 139), 46 N. Y. Supp. 1020.

A nonsuit cannot be ordered on the ground that all the evidence is circumstantial. *Ross v. New York*, 4 Rob. (N. Y.) 49. See also *People v. Cassin*, 42 N. Y. St. R. 133; affirmed, on opinion below, in 136 N. Y. 633; *People v. Hamilton*, 137 N. Y. 531, 50 N. Y. St. R. 22.

“In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts, satisfactorily proved. In the former case, the truth rests upon the second ground before mentioned, namely, our faith in human veracity, sanctioned by experience. In the latter case, it rests on the same ground with the addition of the experienced connection between the collateral facts thus proved and the

fact which is in controversy ; constituting the third basis of evidence before stated.

"The facts proved are in both cases directly attested. In the former case, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy, it is termed *circumstantial* ; and sometimes, but not with entire accuracy, *presumptive*." Greenleaf on Evid. § 13.

That much testimonial evidence involves the same sort of inferences as does circumstantial is thus illustrated by Chief Justice Gibson in *Com. v. Harman*, 6 Am. Law Journal, 123. "You see a man discharge a gun at another ; you see the flash, you hear the report, you see the person fall a lifeless corpse ; and you infer from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain, and your testimony to the fact of killing is, therefore, only inferential, — in other words, circumstantial. It is possible that no ball was in the gun ; and we infer that there was, only because we cannot account for the death on any other supposition."

Direct evidence is not required to prove adultery ; circumstantial evidence will be sufficient if the opportunity and the will to commit the crime are established. *Berckmans v. Berckmans*, 16 N. J. Eq. 122, 17 N. J. Eq. 453 ; *Day v. Day*, 4 N. J. Eq. 444 ; *Adams v. Adams*, 17 N. J. Eq. 324.

#### *Presumptions.*

"I use the word 'presumption' in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof." Stephen's Dig. Evid., Appendix, Note 1.

"A 'presumption' means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." Stephen's Dig. Evid. Art. 1.

*"Presumption" defined.* — "The term 'presumption' is used to signify that which may be assumed without proof, or taken for granted." *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 238.

The conclusion or probable inference drawn in favor of the existence of one fact from others in proof is a legal presumption. *Tanner v. Hughes*, 53 Pa. St. (P. F. Smith) 289; *U. S. v. Searcey* (D. C.), 26 Fed. Rep. 435.

"A presumption, or a probability, — for in this connection these words mean the same thing, — is an inference as to the existence or non-existence of one fact from the existence or non-existence of some other fact, founded on a previous experience of that connection." *Fay v. Reynolds*, 60 Conn. 220.

#### *Conclusive Presumptions.*

"Conclusive, or, as they are elsewhere termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise." *Greenleaf on Evid.* § 15.

"A sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon." *Greenleaf on Evid.* § 18.

#### *Presumptions of Law.*

"Presumptions of law consist of those rules which in certain cases either forbid or dispense with any ulterior inquiry." *Greenleaf on Evid.* § 15.

#### *Presumptions of Fact.*

"Presumptions of fact, usually treated as comprising the second general head of presumptive evidence, can hardly be said, with propriety, to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which

are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever." Greenleaf on Evid. § 44.

"Natural presumption is that process of reasoning which the mind of any person of ordinary intelligence is competent to exercise, and which it naturally will and constantly does exercise in arriving at the belief of the truth of any desired fact by the aid or through the medium of one or more other facts. The reasoning employed is of the description known as probable, and it is founded on the ordinary and usual course of things according to which, the fact known and the fact sought, or facts of the same character, have been previously known, observed, or understood to be in some way connected together." Burrill on Cir. Evid. 11.

In homicide cases the presumption of malice arises from the use of a deadly weapon. *Mitchell v. State* (Ala.), 30 So. 348.

There is a presumption that he who breaks and enters a house of another in the night intends to steal therein. *State v. Worthen* (Iowa), 82 N. W. 910.

The conclusion or probable inference drawn in favor of the existence of one fact from others in proof is a legal presumption. *Tanner v. Hughes*, 53 Pa. St. 289.

#### *Presumption Created by Statute.*

A presumption may be created by legislative act even though the cause of action arose out of the State. It is a matter affecting the remedy. *Penn. Co. v. McCann*, 54 Ohio St. 10; *State v. Weston*, 3 Low. (Ohio) Dec. 15, 1 Nisi Prius, 350.

Congress may create a presumption (*e. g.*, of negligence from the bursting of a boiler). Such presumption will prevail in both State and Federal courts if it refers to a matter within the jurisdiction of Congress. *Murphy v. Northern Transportation Co.*, 15 Ohio St. 533.

A disputable presumption may be lawfully created by statute. *Howard v. Moot*, 64 N. Y. 268.

*Direct and Circumstantial Evidence Compared.*

As good a comparison between the two kinds of evidence as can be cited is that of Chief Justice Shaw. "The distinction, then, between direct and circumstantial evidence is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial ; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and, of course, that no one can be called to testify to it ; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case ; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, and in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

"The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence beside that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions ; and, thanks to a beneficent Providence, the laws of nature and the relations of things to each other are so linked and combined together that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those rising from direct testimony.

"On this subject I will once more ask attention to a remark in the work already cited, East's Pleas of the Crown, ch. 5, § 11. 'Perhaps,' he says, 'strong circumstantial evidence, in cases of crimes like this committed in the most part in secret, is the most

satisfactory of any from whence to draw the conclusion of guilt ; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation ; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual and yet such a conclusion be erroneous.'

"Each of these modes of proof has its advantages and disadvantages ; it is not easy to compare their relative value. The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done ; and the only question is, whether he is entitled to be believed. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

"But, in a case of circumstantial evidence, where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question that in the relation of cause and effect they lead to a satisfactory and certain conclusion ; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell ; and, from the form and number of the footprints, it can be determined with equal certainty whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them ; in doing which, they may be led, by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions ; a source of error not existing in the consideration of positive evidence.

"From this view it is manifest that great care and caution ought

to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced and artificial, conclusion; as, when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the person who broke open the house plundered the property. It has sometimes been enacted by positive law that certain facts proved shall be held to be evidence of another fact; where it is provided by statute that if the mother of a bastard child gives no notice of its expected birth and is delivered in secret, and afterwards is found with the child dead, it shall be presumed that it was born alive and that she killed it. This is a forced and not a natural presumption prescribed by positive law, and not conformable to the rule of the common law. The common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from the fact must be a reasonable and natural one, and, to be a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

"The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it and not repugnant, and go to rebut any contrary presumption." *Com. v. Webster*, 5 Cush. 295, 310.

The testimony of a person as to his own signature is of no higher character than the testimony of another who is acquainted with his handwriting. *Lefferts v. State*, 49 N. J. L. 26.

Circumstantial evidence has frequently been used to discredit the direct evidence of witnesses, and in many cases has entirely overcome the weight of the direct evidence. See *Nelson v. U. S. Fed. Cas.* 10116, where a vessel and cargo were forfeited for breach of the importation laws, notwithstanding the positive evidence of several witnesses.

Circumstantial evidence may be equally as convincing as is direct testimony, and in such case the law gives it as much weight. *Noughon v. State*, 57 Ga. 102.

Circumstantial evidence is said to be as good as any other in West v. State, 76 Ala. 98; Lancaster v. State, 91 Tenn. 267; Curran v. Perceval, 21 Neb. 434.

*Direct Evidence Preferred.*

In Best on Presumptions, § 193, it is said, "Abstractly speaking, presumptive evidence is inferior to direct evidence, seeing that it is, in truth, only a substitute for it, and an indirect mode of proving that which otherwise could not be proved at all."

"The precedence of the former (direct evidence), therefore, rests on grounds of natural propriety and reason, too obvious to be dwelt upon; and it is a precedence which the rules of evidence themselves constantly recognize. Where direct evidence is attainable, circumstantial evidence is of a secondary nature; and no greater discredit can be thrown upon the latter, even in civil cases, than where it is attempted to be used in cases where the former, if attainable, is wilfully withheld." Burrill on Circumstantial Evid. 225.

In Ingalls v. State, 48 Wis. 647, holding that intoxication may be proved to show the improbability of defendant's having committed a crime, it is said, "Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed."

*Distinctions likely to Confuse the Jury.*

It is very generally maintained that the jury should not be given any instructions whatever distinguishing between circumstantial and direct evidence in regard to the weight to which they are entitled. In State v. Rome, 64 Conn. 329, the Court says: "The conclusion reached that, for the practical purposes of a trial, an attempt in instructions to juries to classify evidence as direct and circumstantial, making different rules as applicable to each, would serve 'only to confuse and divert the minds of the jury from the single legitimate question—does the evidence in this case satisfy you of the guilt of the accused, beyond any reasonable doubt?'—is sound."

And see the instructions of the trial court quoted at length and

approved in this case, and also approved in *State v. Kelly*, 77 Conn. 266.

The court should not instruct the jury that circumstantial evidence is inferior to direct. *Cook v. State* (Miss.), 28 So. 833.

*Both Kinds of Evidence Fallible and Both Indispensable.*

"On a final review of the two opinions of the merits of circumstantial evidence, which have been considered in the present chapter, it will be seen that truth occupies the portion of a mean between both. The character of the two species of evidence, in behalf of which they have respectively been advocated, may be summed up in the single remark, that while both, as merely human instruments, are confessedly and unavoidably fallible, both, as instruments of justice, are nevertheless indispensable." Burrill on Cir. Evid. 234.

In *Com. v. Harman*, 4 Pa. 296, Chief Justice Gibson says: "No witness has been produced who saw the act committed; and hence it is argued for the prisoner, that the evidence is only circumstantial, and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not as satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. . . . The only difference between positive and circumstantial evidence is, that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence, but innocent men

have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered, and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree: and it is sufficient for the purpose when it excludes disbelief; that is, actual and not technical disbelief, for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man.

"It is enough that his conscience is clear. Certain cases of circumstantial proof to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence."

For opinion upholding the use of circumstantial evidence, maintaining its necessity and the correctness of its result, and ridiculing attacks made upon it as being due to either ignorance or vice, see *Com. v. Twitchell*, 1 Brewst. (Pa.) 551; *Hickory v. U. S.*, 151 U. S. 303.

"The eye of omniscience can alone see the truth in all cases: circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears he has seen a fact committed."

R. v. Thurtell, 2 Wheeler Cr. Cas. 461, cited with approval in People v. Cronin, 34 Cal. 203.

*Comparative Liability to Error.*

As to the comparative liability to error in the cases of circumstantial and direct testimony, the Court says, in People v. Videts, 1 Parker Crim. 603 : "Although from the imperfection and uncertainty which must ever exist in all human tribunals in which innocent persons have been convicted on presumptive proof, yet from my knowledge of criminal jurisprudence, both from reading and from observation, I have no hesitation in expressing the opinion that where there has been one unjust conviction upon circumstantial evidence alone, there may have been three innocent persons condemned upon the positive testimony of perjured witnesses."

*Caution Required.*

"This point has been pressed with great earnestness, and it has been insisted with much zeal that the verdict is without any sufficient testimony. The inconclusiveness of circumstantial proof, and the danger to be apprehended from convictions upon that species of evidence, have been dwelt upon with much force.

"It is certainly true that great care and caution should be used in the investigation of such testimony. This is true also of every other kind. All human testimony may be false. Our own perceptions may be wrong ; our own senses may deceive us. Whilst this should teach us caution in the forming of our opinions, and deliberation in adopting conclusions, it should not make us carry our doubts too far, because we should thereby be rendered unfit for all the practical duties of life. Such is the state of things which surround us in life, that in all which concerns ourselves and our highest interest we are compelled to act upon testimony, and often upon that testimony which circumstances afford. The same rule is carried into judicial proceedings. Circumstantial evidence has been received in every age of the common law, and it may rise so high in the scale of belief as to generate full conviction. When after due caution this result is reached, the law authorizes its ministers to act upon it." McCann v. State, 13 Smedes & M. (Miss.) 471, 489.

*Undue Weight to Trivial Facts.*

All courts agree that great care should be exercised in drawing inferences from circumstantial evidence, and there may be some dangers incident to it that do not exist in the case of direct testimony. In *Moore v. State*, 2 Ohio St. 500, 507, the Court says: "We would remark, that it is one of the difficulties necessarily attending the investigation of a case where the proof is not positive, but has to be drawn from a chain of circumstances, that too much stress is frequently laid on trivial circumstances, when suspicion has once been aroused and harsh and erroneous conclusions frequently drawn against the accused. And a careful judge will always instruct the jury, that, where the circumstances are reconcilable upon the theory of the accused's innocence, they are bound so to treat them. It is only when the facts and circumstances are irreconcilable with his innocence that he can be convicted."

*Proof of Venue by Circumstantial Evidence.*

Circumstantial evidence alone may be sufficient to establish the venue of a crime. *Burst v. State*, 89 Ind. 133; *Weinecke v. State*, 34 Neb. 14; *Tinney v. State*, 111 Ala. 74; *State v. Benson*, 22 Kan. 471; *State v. Hill*, 98 Mo. 357; *Abrigo v. State*, 29 Tex. App. 143. But see *Franklin v. State*, 64 Tenn. 613.

Proof that an offence was committed in the witness's house and that the house is in a certain place is sufficient proof of venue. *Porter v. People*, 158 Ill. 370.

But it is not enough to show that the owner of a certain saloon that had been broken into lives in a certain place, and that he owns the saloon building. The venue of the building must be shown. *Harlan v. State*, 134 Ind. 339.

No presumption that a homicide occurred in a certain county is raised by proof that the inquest was held there. *Dobson v. State*, 17 S. W. 3.

*Sources of Circumstantial Evidence.*

"This indirect evidence is sometimes drawn from the experience which enables us to trace a connection between an ascertained collateral fact and the fact otherwise undetermined; and it is more or less cogent as this connection is known to be more

or less natural and frequent. When antecedent experience shows this mutuality of relation to be constant or with a great degree of uniformity, the inference deducible, it is said, is properly termed a presumption. But this species of proof embraces a far wider scope than this. It in fact includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. In the latter aspect is a conclusion the value of which obviously depends on the force and directness with which it is derived from the premises concealed or proved." *Stevenson v. Stewart*, 11 Pa. 308.

*Classification of Circumstantial Evidence.*

"The relations and coincidences of facts with each other, from which reasonable inferences may be drawn, are some of a physical or mechanical, and others of a moral, nature. Of the former, some are so decisive as to leave no doubt; as, where human footprints are found on the snow, the conclusion is certain that a person has passed there; because we know, by experience, that that is the mode in which such footprints are made. A man is found dead, with a dagger-wound in his breast; this being the fact proved, the conclusion is, that his death was caused by that wound, because we know that it is an adequate cause of death, and no other cause is apparent. . . .

"These are cases where the conclusion is drawn from known relations and coincidences of a physical character. But there are those of a moral nature, from which conclusions may as legitimately be drawn. The ordinary feelings, passions, and propensities under which parties act are facts known by observation and experience; and they are so uniform in their operation that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive." *Shaw, C. J., in Com. v. Webster*, 5 Cush. 295, 314.

"A third basis of evidence is the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. This is merely the legal application, in other terms, of a process familiar in natural philosophy, showing the truth of an hypothesis by its coincidence

with existing phenomena. The connections and coincidences to which we refer may be either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of men. Their force depends on their sufficiency to exclude every other hypothesis but the one under consideration." Greenleaf on Evid. 16 ed. § 11.

Professor Wigmore classifies circumstantial evidence by first dividing *facta probanda* into three groups: I. A Human Act; II. A Human Quality, Condition, or State; III. A Fact or Condition of External Nature; and then arranging the evidentiary facts into — A. Prospectant; B. Concomitant; C. Retrospectant. Under A. are classified Character, Design, Motive, etc., pointing as they do to future acts. An *alibi* is placed under B.; and Consciousness of Guilt under C., since from it a past act is to be inferred. Wigmore on Evidence, § 43.

## CHAPTER III.

### INCUHPATORY MORAL INDICATIONS.

ALTHOUGH, for reasons which have been explained, a complete enumeration of facts as invariably conjoined with authoritative presumptions would be impracticable, it is important, in illustration of the general principles which determine the relevancy and effect of circumstantial evidence, to notice some particulars of moral conduct, frequently brought to light in courts of criminal jurisdiction, which are both popularly and judicially considered as leading to important and well-grounded presumptions

These circumstances may be considered under the heads of motives to crime, declarations or acts indicative of guilty consciousness or intention, preparations for the commission of crime, possession of the fruits of crime, refusal to account for appearances of suspicion, or unsatisfactory explanations of such appearances, evidence indirectly confessional, the suppression, destruction, simulation, and fabrication of evidence, statutory presumptions, and scientific testimony.

#### SECTION I.

##### MOTIVES TO CRIME.

As there must pre-exist a motive to every voluntary action of a rational being, it is proper to comprise in the class of moral indications, such particulars of external relation as are usually observed

to operate as inducements to the commission of crime, as well as such indications from language and conduct as more directly and unequivocally manifest a connection between the deed and the mind of the actor. In strictness the word "motive," though popularly applied to denote the objects calculated to act on the mind, ought to be limited to the designation of such objects only as have actually influenced the will, and have thus been the efficient causes of moral action.

The metaphorical origin of this word has given rise to serious misconception as to the nature of moral and legal responsibility, upon which it is essential that our conceptions should be accurate. From its primary application to material force, an imaginary analogy has been supposed between the action of moral and physical agencies. In reality, however, there is no resemblance between the definite constraint of mechanical power and the influence of motives on the self-originating will of an intelligent and free agent. MAN is not the passive subject of necessity or chance ; nor are his moral judgments merely the abstractions of logic : on the contrary, he is endowed with instincts, passions, and affections, and above all with reason, and the capacity of estimating the qualities and tendencies of his volitions and actions, and with the power of choosing from among the various inducements, emotional and rational, which are presented to him, the governing principles of his conduct (*a*).

(*a*) 6 Stewart's collected Works, 349 ; Cousin, Cours de l'Hist. de la Philosophie, prem. sér. tome 4, Leçon xxiv.

These considerations constitute the foundation of moral and legal responsibility ; and it follows from them, that in all their important actions we naturally, reasonably, and safely judge of men's motives by their conduct, as we conclude from the nature of the stream the qualities of its source. It is indispensable, therefore, in the investigation of imputed guilt to look at all the surrounding circumstances which connect the actor with other persons and things, and may have operated as motives and influenced his actions.

The common inducements to crime are, the desire of revenging some real or fancied wrong ; of getting rid of a rival or an obnoxious connection ; of escaping from the pressure of pecuniary or other obligation or burden ; of obtaining plunder or other coveted object ; of preserving reputation, either that of general character or the conventional reputation of profession or sex ; or of gratifying some other selfish or malignant passion. But it is of the essence of moral weakness that it forms a mistaken estimate of present good, and a want of proportion will therefore of necessity be found between the objects of desire and the means employed to obtain them. The assassin's dagger may be put in requisition for a few pieces of gold, and the difference between that and other inducements to crime is a difference only of degree. In a sense indeed, and tried by the standard of absolute morality, there can be no such thing as an adequate motive to the commission of crime.

It is always a satisfactory circumstance of corroboration when, in connection with convincing facts

of conduct, an apparent motive can be assigned; but, as the operations of the mind are invisible and intangible, it is impossible to go further; and it must be remembered that there may be motives which no human being but the party himself can divine. Nor must undue importance be attached to external circumstances supposed to be indicative of guilty motive, for there are few men to whom some or other of the forms of crime may not apparently prove advantageous. Neither ought the existence of such apparent inducements to supersede the necessity for the same amount of proof as would be deemed necessary in the absence of all evidence of such a stimulus. Suspicion, too readily excited by the appearance of supposed inducement, is incompatible with that even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment. While true it is, that frequently "imputation and strong circumstances . . . lead directly to the door of truth," it is equally true that entirely to penetrate the mind of man is out of human power, and that circumstances which apparently have presented powerful motives, may never have acted as such. Who can say that some "uncleanly apprehension," some transient thought of sinister aspect, in the dimness of moral light momentarily mistaken for good, may not float unbidden across the purest mind? And how often is it that man has no control over circumstances of apparent power over his motives?

It follows from the foregoing remarks, that evidence of collateral facts which may appear to

have presented a motive for a particular action deserves *per se* no weight. With motives merely, the legislator and the magistrate have nothing to do; ACTIONS, AS THE OBJECTS OR RESULTS OF MOTIVES, are the only legitimately cognizable subjects of human laws. *Actus non facit reum nisi mens sit rea*, is a maxim of reason and justice not less than of positive law (*b*). Motives and their objects differ, it has been remarked, as the springs and wheels of a watch differ from the pointing of the hour, being mutually related in like manner (*c*). But such evidence is most pertinent and important when clearly connected with declarations which demonstrate that the particular motive has passed into action, or with inculpatory moral facts which it tends to explain and co-ordinate, and which would otherwise be inexplicable.

The particulars of external relation and moral conduct will in general correctly indicate the character of the motive in which they have originated. On the other hand, the entire absence of surrounding circumstances, which on the ordinary principles of human nature may reasonably be supposed to have acted as an inducing cause, is justly regarded, whenever upon the general evidence the imputed guilt is doubtful, as affording a strong presumption of innocence.

It occasionally happens that actions of great

(*b*) 3 Inst. 107. For a discussion of the meaning and extent of this maxim, see *Reg. v. Tolson*, 23 Q. B. D. 168. See *infra*, pp. 131-136. As to the use of the word *motive* in this passage, see note at p. 45, *supra*.

(*c*) Hampden's Lectures on Moral Philosophy, 241.

enormity are committed, for which no apparent motive is discoverable. It must not be concluded, however, that no pre-existent motive has operated ; and upon principles of reason and justice essential to common security, the actor is held to be legally accountable for his actions, unless it be clearly and indubitably shown that he is bereft of reason and moral power. A sense of injury, and long-cherished feelings of resentment, may ultimately induce a state of mind independent of self-restraint, and render their victim the sport of ungovernable impulses of passion (*d*) ; but the distinction is evident and just between such actions as are the consequences of a voluntary abdication of moral control, and actions committed under the over-mastering power of a delusion of the imagination, which, though groundless, operates upon the mind with all the force of reality and necessity (*e*).

On a trial for murder, Lord Chief Justice Campbell thus summed up the doctrine under discussion : “With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not ; or whether there is an improbability of its having been committed so strong as not to be overpowered

(*d*) *Rex v. Earl Ferrers*, 19 St. Tr. 885. If the confession of Constance Kent (Ann. Reg. 1865, p. 230) be accepted, her only motive for the deliberate murder of her infant half-brother was a desire to revenge some slighting remarks made by her stepmother as to the first family. She acknowledged that she had received the greatest kindness from her stepmother.

(*e*) *Rex v. Hadfield*, 27 St. Tr. 1281 ; *Rex v. Martin*, York Sp. Ass. 1831, Shorthand Report by Fraser ; *Rex v. Offord*, 5 C. & P. 168.

by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties" (*f*).

It is a general rule for the interpretation of conduct as indicative of motives, demanded by social security and founded in substantial justice, that every man shall be held to have intended, and therefore to be legally accountable for, the natural and probable consequences of his actions (*g*); and no one can be permitted to speculate with impunity upon the precise extent to which he may securely carry his mischievous intentions, the reality and degree of which it is alike impossible to determine. If therefore the motive have been to commit, not the particular crime, but another of equal legal degree, then the maxim applies that *in criminalibus sufficit generalis intentio cum facto parâ gradus* (*h*), "All crimes," says Bacon, "have their conception in a corrupt intent, and have their

(*f*) *Reg. v. Palmer*, Shorthand Report at p. 308. Central Criminal Court, May, 1856. The details of the case are set out at length, *infra*, pp. 344-351. As to the use of the word *motive* in this, the next and some later passages, see note at p. 45, *supra*.

(*g*) *Rex v. Farrington*, R. & R. at p. 207; *Rex v. Harvey*, 2 B. & C. 257; *Rex v. Dixon*, 3 M. & S. 11.

(*h*) Bacon's Maxims of the Law, Regula xv. (Bacon's Works, edited by Spedding, Ellis and Heath, 1859, vol. vii.).

consummation and issuing in some particular fact, which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature. Therefore if an im-poisoned apple be laid in a place to im-poison I. S., and I. D. cometh by chance and eateth it, this is murder in the principal, that is actor, and yet the malice *in individuo* was not against I. D.”(i). “In capital causes,” declares the same high authority, “*in favorem vitæ*, the law will not punish in so high a degree, except the malice of the will and intention do appear” (k). But nevertheless the rule under discussion has been extended beyond all reasonable application, as where two persons were convicted of lying in wait and slitting the prosecutor’s nose with intent to maim and disfigure, an offence then capital by the statute 22 & 23 Car. II. c. 1, though the real intention was to commit murder, in order to obtain an estate, an offence not capital, and there was no such special intent as the statute required (l); a case which, as extending a criminal law by equity, is inconsistent with the general principles of jurisprudence, and with the spirit of many later cases (m).

(i) Bacon, *ib.* Regula xv.

(k) *Ib.* Regula vii.

(l) *Rex v. Woodburne and Coke*, 16 St. Tr. 54.

(m) 4 Lord Campbell’s Lives of the L. Ch. 601; *Rex v. Bell*, Foster’s Discourses on the Crown Law, 3rd ed. 1792, App. p. 430; *Rex v. Carroll*, East, P. C. 394, 397, 398, 400, 402; *Rex v. Duffin*, R. & R. 365.

## SECTION 2.

DECLARATIONS AND ACTS INDICATIVE OF GUILTY  
CONSCIOUSNESS OR INTENTION.

It is very common with persons who have been engaged, or are about to engage, in crime, to make obscure or mysterious allusion to their criminal acts or purposes, or to boast to others whose standard of moral conduct is the same as their own, of what they have done or will do, or to give vent to expressions of revengeful feelings or of malignant satisfaction at the accomplishment or anticipated occurrence of some serious mischief. Such declarations or allusions are of great moment when clearly connected by independent evidence with some anterior or subsequent criminal action.

When an act is of such a nature as not necessarily to imply a guilty intention, and such intention is the specific point in issue, then the evidence of declarations by the party, or of collateral circumstances, may be of the last importance, as explanatory of his motives and purposes. "Declarations referring to former and existing facts," said Lord Chief Justice Eyre, "are the explanation and connection of those facts which serve to make them intelligible. . . . According to the rules of evidence, what a prisoner has said respecting a particular fact is admissible evidence, not in the nature of a confession, but as evidence of the particular fact; and it is therefore agreeable to the general law of evidence to receive such declarations in all cases whatever, in order to explain and to

establish the true state of any matter of fact which is in dispute or the subject of inquiry before a jury" (*n*).

The just effect of such language in reference to future events is to show the existence of the *disposition*, from which criminal actions proceed, to render it less improbable that the person proved to have used it would commit the particular offence, and to explain, if it be in itself ambiguous, the motive or object of the contemplated action. But evidence of such language cannot dispense with the obligation of sufficient proof of the criminal facts; for, though malignant feelings may possess the mind, and lead to intemperate and criminal expressions, they nevertheless may exercise but a transient influence without leading to action (*o*). It must be borne in mind, too, as in regard to the proof of language in general, that declarations may be obscure in themselves, or imperfectly remembered, and that witnesses may speak without a strict and due regard to truth (*p*). "Words," says Mr. Justice Foster, "are transient and fleeting as the wind; they are frequently the effect of sudden transport, easily misunderstood, and often misreported" (*q*). It has been well remarked that, "Mere threats often proceed from temporary irritation without deep-rooted hostility. They indicate a rash and unguarded rather than a determinedly malignant character; and the very utterance of them, as every one well knows, tends to defeat their

(*n*) See *Rex v. Crossfield*, 26 St. Tr. 215.

(*o*) Bentham's *Rationale of Jud. Ev.* b. 5, c. 4, s. 2.

(*p*) Per Dallas, J., in *Rex v. Turner*, 32 St. Tr. 1132.

(*q*) Foster's *Discourses on the Crown Law*, Disc. I. ch. i. s. 8, 3rd ed. (1792) p. 204.

execution. The man who has resolved on a crime is more apt to keep his purpose to himself, or to confide it to an associate, under the seal of secrecy. Even the most wary, however, sometimes let their wicked purposes peep out accidentally in the freedom of companionship, or the weakness of drunken confidence. When such unguarded hints, dark and apparently unmeaning at the time, coincide with the subsequent tokens of guilt, they are strong cords in the net of criminating evidence" (r).

On the principle under consideration, all such relevant *acts* of the party as may reasonably be considered explanatory of his motives and purposes, even though they may severally constitute distinct felonies, are clearly admissible in evidence. Such evidence is known as "evidence of similar facts"; and although it is inadmissible where it amounts to evidence of distinct and different offences against other persons, unconnected with and unrelated to the particular act in question, it is held to be relevant, and is frequently received, not for the purpose of showing a predisposition to commit such a crime as the offence charged, but to show the character of the act, or the state of mind with which it was done; either to show guilty knowledge or a wicked system, or to rebut obvious defences, such as mistake or accident. For these purposes evidence of similar acts, whether previous or subsequent (s) to the act

(r) 1 Dickson's Law of Evidence in Scotland, § 269, p. 157.

(s) In charges of obtaining money by false pretences, it has been said that whereas *previous* acts are admissible (*Reg. v. Francis*, L. R. 2 C. C. 128) *subsequent* acts are not. This would seem to have arisen from a misunderstanding of *Reg. v. Holt* (Bell, C. C. 280). See

charged, may be received on any criminal charge, or in any civil action or proceeding (*t*).

Our reports present many illustrations of this rule. A few, however, will explain its legitimate application. Upon a charge of uttering forged bank-notes, knowing them to be forged, evidence may be given that the prisoner uttered other forged notes either before or after the uttering of the note in question, or that other forged notes were found upon his person, or that other forged notes of the same kind were found in the bank with the prisoner's handwriting upon them (*u*). In the same way upon a charge of uttering counterfeit coin, knowing it to be counterfeit, the facts that other counterfeit coins were found in his pockets (*v*), or that the prisoner previously or subsequently uttered other counterfeit coin of a similar or different description, although such utterings are the subject of separate indictments (*y*), are admissible in evidence in order to show his guilty knowledge.

Where upon the trial of a man for setting fire to a stack of straw it appeared that it caught fire by his

*Reg. v. Rhodes* (L. R. 1899, 1 Q. B. 77), where subsequent acts were admitted, and *Reg. v. Holt* was approved.

(*t*) "There is no difference, that I am aware of, between the rule in civil and in criminal cases on this subject." Per Grove, J., in *Blake v. The Albion Life Ass. Co.*, 4 C. P. D. 94.

(*u*) See *Rex v. Wylie*, and *Rex v. Tattersall*, 1 Bos. & P. N. R. 92, 93, *n.*; *Rex v. Sunderland*, 1 Lewin, C. C. 102, and cases there cited; *Alex v. Ball*, 1 Camp. 324, R. & R. 132; and cf. *Rex v. Millward*, R. & R. 248.

(*x*) *Reg. v. Jarvis*, 25 L. J. M. C. 30.

(*y*) *Reg. v. Foster or Forster*, 24 L. J. M. C. 134; 6 Cox, C. C. 521; *Reg. v. Weekes*, 8 Cox, C. C. 455.

having fired a gun very near to it, evidence was admitted that the stack had been set fire to the day before, and that the prisoner was very near to it with his gun at the same time (*z*); and in a similar case Mr. Justice Patteson admitted evidence of the prisoner's presence and demeanour at incendiary fires of other ricks the property respectively of two other persons, which occurred the same night, although these fires were the subject of other indictments against the prisoner: but the learned judge held that evidence could not be given of threats, statements, and particular acts pointing alone to such other charges, and not tending to explain the conduct of the prisoner in reference to the fire in question (*a*). And where the question was whether the prisoner set fire to his house accidentally or intentionally in order to obtain the insurance money on it, the fact that two other houses in which he had lived had been burned down, and that he had obtained the money for which they had been insured, is admissible to negative the suggestion of accident (*b*). With regard to cases of arson, Mr. Justice Erle said that his experience had taught him that indications of guilt were often found in extremely minute circumstances, which were not the less cogent on that account; that it was to the words whether true or false, by which a man accounted for himself at a critical time, to his conduct when the fire was in progress, to his manner of offering assistance and

(*z*) *Reg. v. Dossett*, 2 C. & K. 306, cor. Maule, J.

(*a*) *Reg. v. Taylor*, 5 Cox, C. C. 138, and for a precisely similar ruling in arson, see *Reg. v. Harris*, 4 F. & F. 342.

(*b*) *Reg. v. Gray*, 4 F. & F. 1102, approved in *Makin v. The A.-G. for New South Wales*, 1894, App. Cas. 57.

othersuch particulars, that attention should be directed, and that in the absence of broad facts, such minute circumstances often afforded satisfactory evidence (*c*). Upon a charge of maliciously shooting, where the question was whether the act proceeded from accident or design, evidence was admitted that the prisoner had intentionally shot at the same person about a quarter of an hour before (*d*).

In charges of murder the same rule applies, and two cases referred to at length hereafter afford an illustration. On a charge of murder by administering prussic acid in porter, Mr. Baron Parke admitted evidence that the deceased had been taken ill several months before, after partaking of porter with the prisoner, and said that although this was no direct proof of an attempt to poison, the evidence was nevertheless admissible, because anything tending to show antipathy in the party accused against the deceased was admissible (*e*); and where the charge was of poisoning with strychnine, after proof that the prisoner was possessed of strychnine in capsules, evidence was received by Mr. Justice Hawkins that three other women died from the effects of strychnine after being intimate with the prisoner, and that he attempted to poison a fourth (*f*).

In a recent leading case this subject was fully discussed before the Judicial Committee of the

(*c*) Charge to the Grand Jury, Warwick Spring Assize, 1859.

(*d*) *Rex v. Voke*, R. & R. 531.

(*e*) *Reg. v. Tawell*, pp. 313-317, *infra*; 2 C. & K. p. 309, note.

(*f*) *Reg. v. Neill*, p. 106, *infra*.

Privy Council, upon an appeal from the Supreme Court of New South Wales. A man named Makin and his wife were tried at Darlinghurst for the wilful murder of an infant child, whose body was found buried in the backyard of a house where the prisoners had lived. They represented to the mother that they were willing to take the child upon payment of a small premium of £3, as they desired to adopt it, having lost a child of their own; and they had alleged that they had received only one child to nurse, and had given it back to the parents. Evidence was admitted to prove that several other infants were received from their mothers on similar representations and upon payment of a sum inadequate for their support for more than a very limited period; and that the bodies of some ten other infants had been found buried in a similar manner in the garden or backyard of houses where the prisoners had successively lived. The prisoners were found guilty, but the judge deferred sentence until after the argument of a special case, as to whether such evidence was rightly admitted. The Judicial Committee held that the evidence was relevant to the issue to be tried by the jury, and was rightly admitted (*g*).

With regard to charges of receiving property knowing it to be stolen, the same rule was formerly strictly applied (*h*). But this subject is now regulated

(*g*) *Makin v. The A.-G. for New South Wales*, 1894, App. Cas. 57, following *Reg. v. Geering* (18 L. J. M. C. 215), see p. 322, *infra*, and *Reg. v. Dossett*, and *Reg. v. Gray*, *supra*, p. 59.

(*h*) See *Reg. v. Bleasdale*, 2 C. & K. 765; *Rex v. Dunn*, 1 Moody, C. C. 146; *Rex v. Davis*, 6 C. & P. 177. In *Reg. v. Oddy* (5 Cox, C. C. 210; 20 L. J. M. C. 198) evidence of possession by the prisoner (previous

by statute, and some restrictions and modifications have been introduced by legislation. By the Prevention of Crimes Act, 1871 (*i*), s. 19, it is enacted that "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months and such evidence, may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of the proceedings taken against him." This section also allows the proof of any previous conviction (within five years) for fraud or dishonesty, provided seven days' notice of the intention to prove it is given; and such conviction may be taken into consideration for proving that the accused knew the property was stolen.

This is an abrogation of the strict principles of the law in cases only of receiving stolen property, inasmuch as it is not now necessary to show any connection between the property found in the prisoner's possession and that which is the subject of the charge. But the statute has been confined to reasonable limits, as it has been held that the other property must be found *at or about the time*

to the date of the alleged receiving) of other goods stolen at other times from other persons, was rejected as inadmissible on a count for either stealing or receiving. On principle this is quite correct, (see per Lord Halsbury, L.C., in *Makin's* case, *supra*), and is still good law except in cases of receiving covered by the section above quoted.

(*i*) 34 & 35 Vict. c. 112.

of finding the stolen property in question, and that if it has been disposed of before such finding, evidence as to its possession is inadmissible (*k*).

The subject-matter of this section may be summarised as follows :—

I. The prosecutor may not, for the purpose of showing that the prisoner was likely to have committed the offence charged, give evidence, either (a) in the form of statements made by the prisoner, or (b) in the form of direct testimony of witnesses, that the prisoner has committed similar but distinct offences or has a disposition to commit such offences.

II. But the above rule does not exclude evidence of similar offences, (a) wherever such offences are so mixed up with that charged as to form virtually one transaction ; (b) wherever they are relevant to make out any step in the proof of the offence charged ; and especially (c) wherever they are relevant to make out guilty knowledge or intention in the commission of the act which is the subject of the charge, or to rebut obvious defences such as accident, mistake, and the like.

III. The rules of evidence above referred to are quite distinct from the rules of procedure relating to the joinder of distinct offences in several counts in one indictment, and the prosecutor's election.

It will be found on examination of the cases that it is somewhat difficult in application to distinguish between rules II. (b) and (c) and III. It has been held in certain cases that rule II. (c) applies where the commission of the physical act charged has been already proved, and it only remains to prove guilty knowledge or intention (see *Reg. v. Francis*, L. R. 2 C. C. R. 108 ; and *Blake v. Albion Life Assurance Society*, 4 C. P. D. 94). Other cases, however, have gone considerably further. Thus in *Reg. v. Geering* (18 L. J. M. C. 215, and p. 322, *infra*) ; *Reg. v. Gray* (4 F. & F. 1102) ; and *Makin v. A.-G. for New South Wales* (1894, App. Cas. 57), the evidence was admitted where the question at issue was the commission of the crime as a whole, including the commission of the physical act charged. In the last of these cases it was held that such evidence may be relevant "if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." These three decisions show, if any authority were needed, that it is not necessary to the admissibility of such evidence to do more than prove by circumstantial or other evidence a *prima facie* case against

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(*k*) See *Reg. v. Drage*, 14 Cox, C. C. 85 ; *Reg. v. Carter*, 12 Q. B. D. 522.

the prisoner from which the jury might or might not infer that he had committed the physical act charged. It may be said in general that wherever the admissibility of evidence depends upon the assumption of a fact, or state of things, it is sufficient, in order to render the evidence admissible, to give *prima facie* evidence of the fact or state of things. The course of the case cannot be stopped whilst the jury or tribunal determines whether the principal fact or state of things has been proved to its satisfaction. It may at times be difficult to get rid of impressions produced by such evidence if the principal fact or state of things be in the end negated; but procedure must follow practical lines, and sufficient confidence must be reposed in the tribunal to assume that it will act rightly under such circumstances. It may also be observed, *with regard to such cases as those just mentioned*, that the similar offences were not really *distinct*, in the sense that the prisoner's conduct presented the appearance of a regular *system* or *series* of offences connected as parts of one scheme, and might therefore be regarded as all parts of one wicked transaction. For a more detailed discussion of these cases see Archbold's Criminal Pleading, 22nd ed. pp. 283—287.

As regards III.—the joinder of distinct offences in one indictment and election between them by the prosecutor—it should be remembered that at common law there was no objection, in point of law, to bringing a man charged with several offences, if they were all felonies or all misdemeanours, before a jury and making him answer for the whole at one time. Felonies and misdemeanours could not be tried together, as the challenges and incidents of trial were different, but if they were all felonies or all misdemeanours, there was no legal objection to the joinder. It was, however, found out early in our legal history that such a procedure operated unfairly, and the practice arose, from convenience as well as from a sense of justice, of making the prosecutor elect upon which charge he would proceed, where two or more felonies were joined in the same indictment. In cases of misdemeanours this was by no means a matter of course, but it could be done where many counts were likely to embarrass the prisoner in his trial. See per Lord Blackburn in *Castro v. The Queen*, L. R. 6 App. Cas. at p. 244. This is the law at the present time, except that in cases of larceny and embezzlement any distinct number of acts, not exceeding three, may be charged in one indictment, if they have been committed within six months. See 24 & 25 Vict. c. 96, ss. 5, 6, and 71. For a fuller discussion of these topics see Russell on Crimes, 6th ed. vol. ii. pp. 282 and 347 *et seq.*

## SECTION 3.

PREPARATIONS AND OPPORTUNITY FOR THE COMMISSION  
OF CRIME.

PREMEDITATED crime must necessarily be preceded not only by impelling motives, but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion—as of poison, coining instruments, combustible matters, picklocks, housebreaking instruments, dark-lanterns, or other destructive, criminal or suspicious weapons, materials, or instruments, and many other acts of apparent preparation—are important facts in the judicial investigation of imputed crime. Where a man had in his possession a large quantity of counterfeit coin unaccounted for, and there was no evidence that he was the maker, it was held to raise a presumption that he had procured it with intent to utter it (*l*). But the personal character for probity, and the civil station of the party, are highly material in connection with facts of this kind. A medical man, for instance, in the ordinary course of his profession, has legitimate occasion for the possession of poisons, a locksmith for the use of picklocks. In many cases the possession of such materials or instruments, and other acts indicative of purpose to commit crime, are made by statute *primâ facie* presumptions of guilt, and in some even substantive offences (*m*).

(*l*) *Rex v. Fuller*, R. & R. 308.(*m*) See *infra*, s. 8, p. 128.

Facts of the kind referred to become more powerful indications of guilty purpose, if false reasons are assigned to account for them ; as in the case of possessing poison, that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases.

The bare possession of the means of crime, or other mere acts of preparation, without more conclusive evidence, are not in general of great weight, because the intended guilt may not have been consummated ; and until that takes place there is the *locus penitentia*. But as preparations must necessarily precede the commission of premeditated crime, some traces of them may generally be expected to be discovered ; and if there be not clear and decisive proof of guilt, the absence of any evidence of such preliminary measures is a circumstance strongly presumptive of innocence.

Falsehoods and invented stories are frequently told by prisoners before the commission of a crime in order to prepare the minds of their acquaintances for the catastrophe, and in cases of some doubt or where natural death or suicide is set up as a defence to a charge of murder, such conduct may prove more important evidence of guilt than any conduct subsequent to the event. In a case referred to at length hereafter, a medical man was indicted for the murder of his wife by poison, and the defence was accident and negligence in leaving the poison by her side. Perhaps the most striking evidence against him was that he wrote various

letters before his wife's death stating that she was unwell, that she was under the care of two medical men and was apprehensive of a miscarriage, at a time when she was cheerful and well. The evidence as a whole left some doubt in the case, and the prisoner was acquitted (*n*).

At the Central Criminal Court in 1864, before Mr. Justice Byles, Mary Hartley was indicted for the murder of her infant child. The body was disposed of in a suspicious manner, but the defence was that the child had died a natural death. The day before the alleged murder, the prisoner wrote a letter in which she stated that her child was dead, whereas at that time and for twelve hours afterwards it was alive and in good health. She was found guilty and sentenced to death (*o*).

In 1839 a woman was tried at Warwick and convicted for administering poison with intent to murder. She had been employed in the house of a medical man, and had put corrosive sublimate into tea and other articles of food which she had prepared for his wife. Amongst the evidence against her was that she had told the milkman that she did not think the lady—who was at the time indisposed, but not seriously ill—would live. Upon being asked why, she said that she had heard “a token”—the footsteps of a man flying along the landing—that she had opened the door and could not see anything, that she had told the doctor and he said it was a token

(*n*) *Reg. v. Belaney.* See *infra*, pp. 336—343.

(*o*) *Reg. v. Hartley.* See the *Times*, August 18th, 1864.

of death. She had had no such conversation with him (*p*).

In the foregoing remarks it is of course assumed that the party possessed the *opportunity* of committing the imputed act, without which neither the existence of motives, nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight.

#### SECTION 4.

##### RECENT POSSESSION OF THE FRUITS OF CRIME.

SINCE the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows that the possession of the fruits of crime recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found, was the real offender, unless he can account for such possession in some way consistent with his innocence (*q*). The force of this presumption has been recognized from the earliest times ; and it is founded on the obvious consideration, that if such possession had been lawfully acquired, the party would be able, at least shortly after its acquisition, to give an account of the manner in which it was obtained ; and his unwillingness or inability

(*p*) *Reg. v. Sarah Kibbler*, Warwick Autumn Assizes, 17th December, 1889, *coram* Wills, J.

(*q*) *Rex v. Burdett*, 4 B. & Ald. at p. 149 ; Burnett on the Criminal Law of Scotland, p. 555 ; 2 Mascardus De Probationibus, Concl. DCCCXXXIV. ; 1 Hume's Comm. on the C. L. of Scotland, 111 ; Best on Presumptions (1844), p. 44.

to afford such explanation is justly regarded as amounting to strong self-condemnatory evidence. But it has been ruled, that if the party give a reasonable account of the way in which he became possessed of the property, as by stating the name of the person from whom he obtained it, and such party is known to be a real person, and capable of being easily referred to, it is then incumbent on the prosecutor to show that such account is false. Therefore, where a man was indicted for stealing a piece of wood, which was found in his shop five days after the theft, and he stated that he had bought it from a person whom he named, who lived about two miles off, it was held that the prosecutor was bound to show that the account was false (*r*). But if the account given be unreasonable or improbable on the face of it, or if the party have given different accounts of the same transaction, then he will not be relieved from the pressure of the general rule of presumption (*s*). It is, however, in all cases for the jury to judge whether the prisoner has given a sufficiently reasonable account of his doings to put the prosecution upon further inquiry (*t*), and what effect should be given to any failure to make such inquiry. No absolute or hard-and-fast rule can be laid down upon the subject, and all the circumstances which affect the question whether it was reasonable that a particular line of investigation should be taken up, or which tend to show that injustice has or has not

(*r*) *Reg. v. Crowhurst*, 1 C. & K. 370; cf. *Reg. v. Smith*, 2 C. & K. 207.

(*s*) *Reg. v. Harmer*, 3 Cox, C. C. 487; *Reg. v. Debley*, 2 C. & K. 818.

(*t*) *Reg. v. Hughes*, 1 Cox, C. C. 176.

been done to the prisoner by the omission to do so, must be taken into consideration and weighed along with the rest of the evidence.

1. It is manifest that the force of this rule of presumption depends upon the recency of the possession as related to the crime, and that if the interval of time is considerable, the presumption is much weakened, and more especially if the goods are of such a kind as in the ordinary course of things frequently to change hands. From the nature of the case, it is not possible to fix any precise period within which the effect of this rule of presumption can be limited; it must depend not only upon the mere lapse of time, but upon the nature of the property, and the concomitant circumstances of each particular case. Where two pieces of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after being missed, and still in the same state, it was held that this was a possession sufficiently recent to call upon him to show how he came by the property (*u*). In another case, Mr. Justice Bayley directed an acquittal, because the only evidence against the prisoner was that the goods were found in his possession after a lapse of sixteen months from the time of their loss (*v*); and where a shovel was found, six months after the theft, in the house of the prisoner, who was not then at home, Mr. Baron Gurney held that on this evidence alone the prisoner ought not to be called upon for his

(*u*) *Reg. v. Partridge*, 7 C. & P. 551.

(*v*) *Rex v. —*, 2 C. & P. 459.

defence (*x*). Where the evidence against a prisoner, charged with the larceny of an axe, a saw and a mattock, was, that the stolen articles were found in his possession three months after they were missed, it was held that this was not such a recent possession as *per se* to put him upon showing how he came by them (*y*); and where a stolen horse was found in the prisoner's possession six months after it was lost, Mr. Justice Maule held that this was no case to go to the jury (*z*). But in another case, where three sheets were found upon the prisoner's bed in his house three months after they had been stolen, Mr. Justice Wightman held that the case must go to the jury, on the ground that it was impossible to lay down any rule as to the precise time which was too great to call upon the prisoner to account for the possession (*a*); and where seventy sheep were put upon a common on the 18th of June, but not missed until November, and the prisoner was proved to have had possession of four of them in October, and of nineteen more on the 23rd of November, the judge allowed evidence of the possession of both to be given (*b*).

2. It is obviously essential to the just application of this rule of presumption, that the house or other place in which the stolen property is found should be in the *exclusive* possession of the prisoner.

(*x*) *Rex v. Cruttenden*, Best on Presumptions (1844), p. 306; 6 Jurist, 267.

(*y*) *Rex v. Adams*, 3 C. & P. 600.

(*z*) *Reg. v. Cooper*, 3 C. & K. 318.

(*a*) *Rex v. Hewlett*, 3 Russell on Crimes, 6th ed. p. 355, note (*a*).

(*b*) *Rex v. Dewhirst*, 2 Starkie on Ev. 3rd ed. p. 614.

Where it is found in the apartments of a lodger, for instance, the presumption may be stronger or weaker, according as the evidence does or does not show an exclusive possession. As a general rule, where stolen goods are found in the house of a married man, they must be considered in his possession, and not in the possession of his wife, unless there be evidence of something specially to implicate her, such as statements made, or acts done by her, in which case it must be left to the jury to decide in whose possession they were (*c*). Therefore, where a wife was indicted with her husband for receiving stolen property, and it appeared that she had destroyed the property, it was held to be a question for the jury whether she had so dealt with it, to aid her husband in turning it to profit, or merely to conceal his guilt, or screen him from the consequences (*d*). And where, upon the trial of a man for receiving stolen tin, it was objected that evidence to prove that his wife was seen carrying tin under her cloak from a warehouse on the premises immediately after his arrest, ought not to be received, as the possession was the personal possession of the wife, and ought not to affect the husband, Mr. Justice Coleridge held that it was for the jury to consider whether the wife's was not the prisoner's possession, she being upon the premises, and all the circumstances being taken into consideration, and that it was not like the case where the wife is in possession of stolen property at a distance from the premises of her husband (*e*).

(*c*) *Reg. v. Banks*, 1 Cox, C. C. 238.

(*d*) *Reg. v. M'Clarens*, 3 Cox, C. C. 425; and *Reg. v. Brook*, 6 *ib.* 148.

(*e*) *Reg. v. Mansfield*, Car. & M. 140.

3. The force of this presumption is greatly increased if the fruits of a plurality or of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a number of miscellaneous articles, or be of an uncommon kind, or from its value or other circumstances, be inconsistent with or unsuited to the station of the party. On the trial of two men at Aberdeen autumn circuit, 1824, it appeared that a carpenter's workshop at Aberdeen was broken open on a particular night, and some tools carried off, and that on the same night the counting-houses of Messrs. Davidson and of Messrs. Catto and Co., in different parts of that city, were broken into, and goods and money to a considerable extent stolen. The prisoners were met at seven on the following morning in one of the streets of Aberdeen, at a distance from either of the places of depredation, by two of the police. Upon seeing the officers they began to run; and being pursued and taken, there was found in the possession of each a considerable quantity of the articles taken from Catto and Co., but none of the things taken from the carpenter's shop or Davidson's. But in Catto and Co.'s warehouse were found a brown coat and other articles got from Davidson's, which had not been there the preceding evening when the shop was locked up; and in Davidson's were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto and Co.'s proved that the prisoners were the depredators in that warehouse; while the fact of the articles taken from Davidson's having been left there, connected them with that prior housebreaking;

and again, the chisels belonging to the carpenter's shop, found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The prisoners were convicted of all the thefts (*f*). A still stronger case of the same kind occurred at Aberdeen, in April, 1826, on the trial of a man who was accused of no fewer than nine different acts of theft by housebreaking, committed in and around that place at various times during the summer of 1825 and the following winter. No suspicion had been awakened against the prisoner, who was a carter, living an industrious and apparently regular life, until one occasion, when some of the stolen articles having been detected in a broker's shop, and traced to his custody, a search was made, and some articles from all the houses broken open found amongst an immense mass of other goods, evidently stolen, in a large chest, and about various parts of the prisoner's house. Their number and variety, and the place where they were found, were quite sufficient to convict him of receiving the stolen property; but as they were discovered at the distance of many months from the times when the various thefts had been committed, the difficulty was how to connect him with the actual theft. The charges selected for trial were five in number, and as nearly connected with each other in point of time as possible. In none of them was the prisoner identified as the person who had broken into the

(*f*) *Rex v. Downie and Milne*, Alison's Principles of the Criminal Law of Scotland, vol. i. p. 313; 2 Mascardus De Probationibus, Concl. DCCCXXXI.

houses, although the thief had been seen, and more than once fired at ; but in all the first four houses which had been broken into, were discovered some of the articles taken from the others, and in the prisoner's custody were found some articles taken from them all, which sufficiently proved that all the depredations had been committed by one person ; and the mark of an iron instrument was found on three of the windows broken open, which coincided exactly with a chisel left in the last house. Two days after the housebreaking of that house, an old watch, part of the stolen property, was shown by the prisoner to a shopkeeper, to whom he soon afterwards sold it, and by him delivered up to the officers. Upon this evidence the prisoner was convicted of all the charges of housebreaking (*g*).

4. The recent possession of stolen property may sometimes be referable not to the crime of theft, but to that of having received it with a guilty knowledge of its having been stolen. Four persons were found guilty of housebreaking on proof of the recent possession of the goods, and narrowly escaped execution, the offence at that time being capital, but it was afterwards ascertained that one of them, who had long been known as a receiver of stolen goods, knew nothing of the robbery until after it had been committed, and had purchased the goods from the real thieves the day after the robbery (*h*). The difficulty

(*g*) *Rex v. Bowman*, Alison's Principles of the Criminal Law of Scotland, vol. i. p. 314. According to Scotch law, several offences—not necessarily of the same character—could be included in the same libel. See Alison, vol. ii. p. 238.

(*h*) *Rex v. Ellis*, Ann. Reg. 1831 (Chr.), p. 65.

of referring the act of possession specifically to either stealing or receiving frequently led to the failure of justice ; thus, where stolen goods were found shortly after the theft concealed in an old engine-house, and the place being watched, the prisoners were seen to go there and take them away, yet, being indicted as receivers, they were acquitted ; Mr. Justice Patteson being of opinion that this seemed to be evidence rather of a stealing than a receiving (*i*). These distinctions can seldom now lead to a failure of justice, since by 24 & 25 Vict. c. 96, s. 92 (following an earlier statute), counts for stealing and receiving the same property may be joined in one indictment in respect of the same offence.

It is not necessary that the receiver of stolen property should have obtained a guilty knowledge by direct information ; it is sufficient if the circumstances under which it was received were such as must have satisfied any reasonable mind that it must have been dishonestly obtained ; as, if he purchased it at an undue value (*k*), at suspicious and unseasonable times, or from persons who in the ordinary course of things could not fairly be considered as the unsuspected owners of property of the particular description, or has secreted or endeavoured to secrete it, or attempted to explain the manner of acquisition by falsehood or prevarication (*l*).

(*i*) *Rex v. Densley*, 6 C. & P. 399 ; and see *Rex v. Dyer*, 2 East, P. C. 767 ; and *Rex v. Atwell*, *ib.* 768.

(*k*) Hale's P. C., vol. i. p. 619.

(*l*) See Alison's Principles of the Criminal Law of Scotland, vol. i. p. 330.

5. The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a presumption that he was present and concerned in the offence (*m*). This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognized. It is upon the same principle that a sudden and otherwise inexplicable transition from a state of indigence and a consequent change of habits, or a profuse or unwonted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavourable to the supposition of innocence (*n*).

6. But the rule must be applied with discrimination, for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt. Sir Matthew Hale lays it down, that "if a horse be stolen from A., and the same day B. be found upon him, it is a strong presumption that B. stole him; yet," adds that excellent lawyer, "I do remember

(*m*) *Rex v. Rickman*, 2 East, P. C. 1035; and see *Rex v. Fuller*, R. & R. 308.

(*n*) *Rex v. Burdock* (murder by poison), Bristol Ass. Ap. 1835, *cor.* Sir Chas. Wetherell, Recorder.

before a learned and very wary judge, in such an instance B. was condemned and executed at Oxford Assizes, and yet within two assizes after, C., being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion, and escaped ; and B. was apprehended with the horse and died innocently" (*o*). A very similar case occurred at the Surrey Summer Assizes, 1827, where a young man was convicted of stealing two oxen. The prisoner, having finished his apprenticeship to a butcher at Monkwearmouth, went to visit an uncle at Portsmouth, from whence he set out to return to London. On the road between Guildford and London, about three o'clock in the morning, he overtook a man riding upon a pony and driving two oxen, who finding that he was going to London, offered him five shillings to drive them for him to London, which he agreed to do, the man engaging to meet him at Westminster Bridge. At Wandsworth he was apprehended by the prosecutor's son, and charged with stealing the oxen. On his apprehension he assumed a false name, under which he was tried, to conceal his situation from his friends, and convicted, but on a representation of the circumstances he received a pardon, when on the point of being transported for life (*p*) ; he had been the dupe of the real thief, who, finding himself closely pursued,

(*o*) 2 Hale, P. C. p. 289.

(*p*) *Rex v. Gill*, O.B. Sessions Papers and Ann. Reg. 1827 (Chr.), p. 179.

had thus contrived to rid himself of the possession of the cattle.

7. The rule under discussion is occasionally attended with uncertainty in its application, from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied, where there is reasonable ground to conclude that the witnesses may be mistaken, or where from any other cause identity is not satisfactorily established. But the rule is nevertheless fairly and properly applied in circumstances where, though positive identification is impossible, the possession of the property cannot without violence to every reasonable hypothesis but be considered of a guilty character; as in the case of persons employed in carrying tea, sugar, tobacco, and other like articles from ships and wharves. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could not otherwise be proved (*q*). On this principle two men were convicted of larceny upon evidence that the prosecutor's soap-manufactory, near Glasgow, had been broken into in the night and robbed of about 120 lbs. of yellow soap, and that the prisoners were met on the same night, about eleven o'clock, by the watchman, near the centre of the city, from whom they attempted to escape, one bearing on his back forty pounds of soap

(*q*) 2 East, P. C. 1035.

of the same size, shape, and make as that stolen from the prosecutor's premises, and the other with his clothes soiled over with the same substance, though the property could not be more distinctly identified (*r*). It is seldom, however, that juries are required to determine upon the effect of evidence of the mere recent possession of stolen property; from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property,—if he deny that it is in his possession, and such denial be discovered to be false,—if he cannot show how he became possessed of it,—if he give false, incredible, or inconsistent accounts of the manner in which he acquired it, as that he found it, or that it had been given or sold to him by a stranger, or left at his house,—if he have disposed of or attempted to dispose of it at an unreasonably low price,—if he have absconded or endeavoured to escape from justice,—if other stolen property, or housebreaking tools, or other instruments of crime be found in his possession,—if he were seen near the spot at or about the time when the act was committed,—or if any article belonging to him be found at or near the place where the theft was committed, at or about the time of the commission of the offence,—if the impressions of his shoes or other articles of apparel correspond with marks left by the thieves,—if he have attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice,—these, and all like

(*r*) *Rex v. M'Kechnie and Tolmie*, Alison's Principles of the Criminal Law of Scotland, vol. i. p. 322.

circumstances, are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for (*s*).

### SECTION 5.

UNEXPLAINED APPEARANCES OF SUSPICION, AND ATTEMPTS TO ACCOUNT FOR THEM BY FALSE REPRESENTATIONS.

As a general rule, to which the exceptions can be but rare, it is a reasonable conclusion, that an innocent party can explain suspicious or unusual appearances, connected with his person, dress or conduct; and that the desire of self-preservation, if not a regard for truth, will prompt him to do so. The ingenuous and satisfactory explanation of circumstances of apparent suspicion always operates powerfully in favour of the accused, and obtains for him more ready credence when the explanation may not be easily verified (*t*). On the other hand, the force of suspicious circumstances is augmented, whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain. An old man on his way home from market, where he had stayed late, was attacked, thrown down, and robbed by three men, one of whom he wounded in the struggle with

(*s*) Upon the subject-matter of this section compare Roscoe's *Criminal Evidence* (12th ed.) pp. 17 and 783, and Russell on *Crimes* (6th ed.) vol. ii. pp. 287 *et seq.* and vol. iii. pp. 355 *et seq.*

(*t*) See the case of *Reg. v. Pook*, pp. 250-252, *infra*.

a clasp-knife. Upon the apprehension of one of the robbers at the house of his mother, he was dressed in a new pair of trousers, and the constable found in a room upstairs, between the bed and the mattress, a pair of trousers with two long cuts in one thigh, one of which had penetrated through the lining, and was stained with blood at that spot ; and the holes had been sewed with thread which was not discoloured, showing that the blood must have been applied to the cloth previous to the repair, and a corresponding cut bound over with plaisters was found on the prisoner's thigh. He refused to give any explanation of the wound or of the cuts in the garments, and was convicted and transported (*u*).

But circumstances of suspicion merely, without more conclusive evidence, are not sufficient to justify conviction, even though the party offer no explanation of them. Two women were indicted for colouring a counterfeit shilling and sixpence, and a man as an accessory ; and the evidence against him was that he visited the women once or twice a week, that the rattling of copper money was heard while he was with them, that once he was counting something just after he came out, that on going to the room just after their apprehension, he resisted being stopped, and jumped over a wall to escape, and that there were found upon him a bad three-shilling-piece and five bad sixpences : upon a case reserved, the judges thought the evidence too slight to convict him (*x*).

(*u*) *Rex v. Dawtrey*, York Sp. Ass. 1841.

(*x*) *Rex v. Isaacs*, Russell on Crimes (6th ed. by Smith & Keep), vol. i. p. 216. *Sed quære*.

So natural and forcible is this rule of presumption, that the guilty are instinctively compelled to endeavour to evade its application, by giving some explanation or interpretation of adverse facts, consistent, if true, with innocence; but its force is commonly aggravated by the improbability, or absurdity even, of such explanations, or the inconsistency of them with admitted or incontrovertible facts. All such false, incredible, or contradictory statements, if disproved, or disbelieved, are not simply neutralized, but become of a substantive inculpatory effect. Even in such circumstances, however, guilt cannot be safely inferred, unless such a substratum of evidence, direct or circumstantial, has been laid as creates an independent *primâ facie* case against the prisoner (*y*). On the trial for the murder by poison of a female, whom the prisoner alleged to have died from the effects of a draught taken by her in anger during an altercation between them, Mr. Baron Parke told the jury that it was for them to say whether the falsehoods the prisoner had told, did not show that he was conscious that he had been guilty of some act that required concealment; that it was very true he might not wish it to be known he had been visiting a woman who, there was good reason to believe, had formerly been his mistress; but that, if he was an innocent man, and had been present at the death, one would have supposed he would have disclosed it immediately and called in some

(*y*) Per Mr. Justice Littledale in *Rex v. Clark*, Warwick Summ. Ass. 1831. It would be more accurate to say "a substantial and independent *primâ facie* case."

assistance. They had here two untruths, that he meant to dine at the west end of the town and did not; and his denial that he had been out of London that evening; these he said, were very material matters for their inquiry, bearing in mind that upon the evidence there was a very ample case for grave consideration, to show that the deceased died of prussic acid, and that the prisoner was present in the house at the moment of that death. His Lordship added, that if the prisoner's representation had been true, that the deceased had poisoned herself, one would have supposed that he would have taken the first opportunity, having been present at the time this occurred, of exonerating himself from it, by making this declaration to the first person he met; one would expect, if he had been a man of the least cordial feeling, he would have waited to see whether it was true or not that she had taken this poison, and called for assistance, instead of which, he is proved to have gone in a short time to London, and when he got to London he is proved to have denied altogether that he had been at Slough. You must judge, said the learned Baron, of the truth of the case against a person by all his conduct taken together (z).

An important consideration in this connection is the time at which and the occasion upon which the explanation of suspicious circumstances or other matter of defence within the knowledge of an accused person is propounded. Has it been put

(z) *Reg. v. Tawell*, Aylesbury Sp. Ass. 1845. 2 C. & K. 309, note.  
1 Woodall's Celebrated Trials, 162, and see pp. 313-317, *infra*.

forward at the natural time? In some instances the explanation or matter of defence would spring unbidden to the lips of an innocent man the moment he was accused of the crime in question. In others it would be natural enough that he would require time to collect his thoughts and exercise his memory. In all cases, if it involves allegations of fact, the truth of which can be inquired into, the value to be attached to it will depend, and ought to depend, largely upon whether the opportunity for inquiry is afforded by the person inculpated. If the opportunity be given, and the facts alleged are not contradicted by evidence, the natural and proper inference is that they are true, and the accused person ought to have the full benefit of such an inference. If they are suppressed until inquiry is impossible, while it is too much to say that they ought not to be listened to and considered, the credit to be given to them and to any evidence by which they may be supported ought to be very largely discounted.

There are three occasions upon which every man who is tried upon indictment has had the opportunity of giving any explanation of his conduct or of mentioning any other defence he may have: first, when he is originally charged, whether by an employer or other person having legitimate occasion to speak to him upon the subject of the charge, or by a police officer making inquiries or effecting his arrest; secondly, when formally charged at the police station; and thirdly, after the evidence has been given against him before the magistrates and he is offered the choice whether he wishes to say anything

in answer to the charge or not. The last is of course the most important of these occasions. It is a common trick of criminal advocacy to say in answer, "I reserve my defence; I call no witnesses here, and I offer no evidence," and the criminal classes themselves have caught it from their advisers, and largely make use of the phrase.

Such a beginning is to say, the very least, a bad introduction to a true story. Occasionally, the explanation or defence is nevertheless true, and the suspicion with which, under such circumstances, it ought to be regarded is due to very bad advice; but this is a rare exception, and usually such an answer given before committal means that there is no defence, or that a story is in contemplation which will not bear investigation.

It is very necessary that such considerations should be borne in mind. There is a natural and a wholesome tendency in most men to give to a prisoner who is often a man with small or no means, and who speaks at a disadvantage necessarily incident to his position, every possible consideration, and plausible stories told from the dock by persons, many of whom are consummate actors (*a*), are apt to meet with more rather than with less of the attention they deserve. Want of means to bring witnesses is

(*a*) On one occasion the Editor offered a prisoner an adjournment of the trial in order that the witnesses, who he said could prove his innocence, might be produced. The offer was accepted with an appearance of effusive gratitude, which made it appear almost an unnecessary ceremony. The witnesses came the next day, when it appeared that the story was a fabrication from beginning to end.

constantly alleged. This may be a legitimate excuse for not bringing the witnesses. It is none for the failure to mention at the right time and upon the natural occasion, the facts which it is alleged that these witnesses could prove, in which case the omission on the part of the prosecution to investigate and bring evidence of the real facts will serve the prisoner quite as effectually as the witnesses themselves could do. Of course, ignorance or want of education on the part of a prisoner must be taken into account, and all such considerations as have been pointed out should be applied with caution and judgment. But they are important, and are of very general application. The most ignorant man in the world, accused of committing a crime in London the day before yesterday, if he had really been in Birmingham at the time in question, could scarcely fail to say so ; and the same observation applies to many less simple illustrations of the matter under discussion.

There are few limits to the ingenuity and plausibility of many of the criminal classes—a fact of which a judge has had much more experience than jurors can possibly have—and if a plausible falsehood be impressively told from the dock or by the prisoner in the witness box, and told upon his trial for the first time, there may be no answer to it possible except that it is then told for the first time. Occasionally it is possible to test a story told under such circumstances, especially since the Act which has permitted jurors, on trials for felonies other than murder, to separate before giving their verdict, and has thus made an adjournment possible if there

is time for it before the conclusion of the particular assizes or sessions. The Editor has made use from time to time of such a power under such circumstances, and the result has almost, if not quite, universally been to discredit a story reserved for production on the day of trial.

The following is a striking instance of the kind. A man named Williams was tried for breaking into a lady's house at Salisbury on the 9th May, 1901. Six or seven pounds in sovereigns, a watch, a ring, a set of false teeth, and other articles were stolen from the house between 1 and 4 P.M., during the absence of the inmates at a bazaar, which was opened by Lord Roberts. Evidence was given by the postmaster at Salisbury that a person, whom he identified as the prisoner, had, about 1.50, brought to the post-office for despatch a brown paper parcel. After his departure the postmaster had compulsorily registered it, because it appeared to him to contain valuables. Five minutes later the same man returned, bought three postal orders for £1 each, and paid for them with three sovereigns and the odd pence. The parcel was directed to Mrs. Williams, 8, Harvey Street, Hyde Road, Hoxton. Upon the robbery being discovered, the police at Salisbury telegraphed to the police at Hoxton, and the next morning, when the postman called at 8, Harvey Street, a detective followed him into the house, and took possession of a registered brown paper parcel and a letter which were about to be delivered to the prisoner, who was standing on the staircase. His wife was in the house. He was arrested and taken to Salisbury,

where the parcel was opened, and found to contain the stolen watch, ring, and false teeth. The letter contained the three postal orders procured at Salisbury, and three others for a like amount issued on the same 9th May, at Winterbourne Gunner, four miles from Salisbury.

The prisoner had made no answer to the charge at the police station, and before the magistrates had simply denied his guilt. At the trial, however, he went into the witness box, and swore that he was at Battersea all day on the 9th May. He was a person against whom nothing had been recorded, and was of respectable appearance and plausible manners. It was strongly urged on his behalf that it was a case of mistaken identity, that no evidence had been given of his having been at Winterbourne Gunner, or obtained the postal order issued from that office, and that the real thief was the unknown man who had obtained the Winterbourne Gunner orders. The judge observed that had the prisoner denied at an earlier stage that he had been at Salisbury on the 9th May, the police would no doubt have given evidence of what had happened at Winterbourne Gunner, and that inquiries there would have probably resulted in the demonstration either of the prisoner's guilt or of his innocence. The trial was adjourned for a couple of hours, at the end of which time the postmistress from Winterbourne Gunner was produced. She swore that the prisoner had come to her post-office about four o'clock, and had bought the three postal orders contained in the letter. The nearest railway station to Winterbourne Gunner is Porton, which is about a mile off. The keeper of a

hotel at Porton proved that the prisoner and another man had called at his hotel, about a quarter past four, had gone into the commercial room and written letters, and gone out again. They had then returned and gone to the railway station, which is close by, a little after 5. A railway porter identified the prisoner as one of two men who had left together by the 5.32 train.

The prisoner had asserted that he was in Hyde Road on the evening of the 9th May, and had seen the detective who arrested him the next morning in the streets, describing his dress. The detective admitted that he was there soon after 9, and it was suggested that there was not time for the prisoner to have reached Hoxton by that hour if he had been at Porton at 5.30, particularly as the trains from Salisbury on that night were very full. Of course no railway official could be called to show at what time the train leaving Porton at 5.32 arrived at Waterloo. It happened, however, that the High Sheriff, who was in court, had travelled to London by the very train in question, and he deposed that the train arrived at Waterloo about 8, which left an ample margin for arrival at Hoxton before 9. Thus the prisoner's story and the suggestions made on his behalf were all completely disproved, and the prisoner was convicted (*b*).

Allowance must nevertheless be made for the weakness of human nature, and for the difficulties which may attend the proof of circumstances of

(*b*) *Rex v. Thomas Williams*, Salisbury Summer Assize, 1901, *coram* Wills, J.

exculpation (*c*); and care must be taken that circumstances are not erroneously assumed to be suspicious without sufficient reason (*d*).

## SECTION 6.

### INDIRECT CONFESSORIAL EVIDENCE.

Although the subject of direct confession does not fall within the province of this essay, it is necessary to advert to some of the principal rules which relate to that important head of moral evidence; because they are of great moment in their application to such particulars of circumstantial evidence as are only indirectly in the nature of confessional evidence.

A voluntary confession of guilt, if it be full, consistent, and probable, is justly regarded as evidence of the highest and most satisfactory nature (*c*). Self-love, the mainspring of human conduct, will usually prevent a rational being from making admissions prejudicial to his interest and safety, unless when caused by the promptings of truth and conscience.

By the law of England, a voluntary and unsuspected confession is clearly sufficient to warrant conviction, wherever there is independent proof of

(*c*) See *Rex v. Gill*, Ann. Reg. 1827 (Chr.), p. 179. Sessions Papers. And see 2 Hale, P. C. p. 289.

(*d*) See *Rex v. Looker*, p. 242, *infra*, and *Rex v. Thornton*, p. 244, *infra*.

(*e*) 3 Mascardus De Probationibus, Concl. xv., xvi.; *Rex v. Warrickshall*, 1 Leach, C. C. 263; Greenleaf's L. of Ev. § 219.

the *corpus delicti*. According to some authorities, confession alone is a sufficient ground for conviction, even in the absence of any such independent evidence; but the contrary opinion is most in accordance with the general principles of reason and justice, the opinions of the best writers on criminal jurisprudence, and the practice of other enlightened nations, and may now be accepted as settled law (*f*). The cases adduced in support of the doctrine that confession without other proof of the *corpus delicti* is sufficient, are not very decisive, since in all of them there appears to have been some evidence, though slight, of confirmatory circumstances, independently of the confession (*g*).

Judicial history presents warning of the danger of placing implicit dependence upon abundant confession even where exempt from all suspicion of coercion, physical or moral, or other sinister influence. How greatly then must such danger be aggravated, where confession constitutes the only evidence of the fact of a *corpus delicti*; and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances, which may induce a false confession! The agonies of torture, the dread of their infliction, the hope of escaping the rigours of slavery or the hardships of military service, a weariness of existence,

(*f*) Best on Presumptions p. 330, and the cases cited; 1 Greenleaf's L. of Ev. § 217; Alison's Principles of the Criminal Law of Scotland, p. 325; Code Pénal d'Autriche, partie 1, § 2, ch. x.

(*g*) *Rex v. Fisher*, 1 Leach, C. C. p. 311; *Rex v. Eldridge*, R. & R. 440; *Rex v. Falkner*, ib. 481; *Rex v. White*, ib. 508; *Rex v. Tippet*, ib. 509; 1 Greenleaf's L. of Ev. § 217.

self-delusion, the desire to shield a guilty relative or friend from the penalties of justice (*h*), the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the chance of escaping unmerited punishment and disgrace, the hope of pardon—these and numerous other inducements have not unfrequently operated to produce unfounded confessions of guilt.

Innumerable are the instances on record of confession extracted “by the deceitful and dangerous experiment of the criminal *quæstion*, as it is emphatically styled” (*i*), of offences which were never committed, or not committed by the persons making confession (*k*). Nor have such instances been wanting on the continent of Europe even in the present century.

When Felton, upon his examination at the Council Board, declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham, the Bishop of London said to him, “If you will not confess you must go to the rack.” The man replied, “If it must be so, I know not whom I may accuse in the extremity of the torture,—Bishop Laud perhaps, or any lord at this Board” (*l*). “Sound sense,” observed the excellent Sir Michael Foster, “in the mouth of an enthusiast and a ruffian” (*m*).

(*h*) Chitty's Criminal Law, vol. i. p. 85.

(*i*) Gibbon's Decline and Fall, ch. xvii.

(*k*) Jardine on the Use of Torture in the **C. L. of England**† pp. 5-7; and see Fortescue *De Laudibus Legum Angliæ*, ch. 22.

(*l*) Rushworth's Collections, vol. i. p. 638, referred to in Jardine, p. 11.

(*m*) Foster's Discourses on the Crown Law, Disc. I. ch. 3, s. 8 (3rd ed. p. 244).

Not less repugnant to policy, justice, and humanity is the moral torture to which in some (perhaps in most) of the nations of Europe, persons suspected of crime are subjected, by means of searching, rigorous, and insidious examinations, conducted by skilful adepts in judicial tactics, and accompanied sometimes even by dramatic circumstances of terror and intimidation (*n*).

Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. "Though," says he, "the Lord Chief Justice told the King that 'all his discourse was so disjointed he did not believe him guilty,' yet upon his own confession the jury found him guilty, and he was executed accordingly"; the historian adds, "though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only upon his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life, and chose to part with it this way" (*o*).

(*n*) See the case of Riembaur, a Bavarian priest, charged with murder, in *Narratives of Remarkable Criminal Trials*, by Feuerbach, *vide supra*, p. 31.

(*o*) Clarendon's *Life and Continuation*, vol. iii. p. 94 (Oxford ed. 1827). Sir Samuel Romilly (*Memoirs*, vol. ii. p. 182) relates a case in his own experience, where an innocent man was erroneously executed in pursuance of the sentence of a court-martial, on a charge of mutiny, solely on account of his defence being a confession and an appeal for mercy.

A very remarkable case of this nature was that of the two Boorns, convicted in the Supreme Court of Vermont in September term, 1819, of the murder of Russell Colvin, May 10th, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a quarrel broke out between him and them, and that one of them struck him a violent blow on the back of the head, with a club, which felled him to the ground. Some suspicions arose, at that time, that he was murdered: which were increased by the finding of his hat, in the same field, a few months afterwards. These suspicions in process of time subsided; but in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field; and in a hollow stump not many rods from it, were discovered two nails and a number of bones believed to be those of a man. Upon this evidence, together with the deliberate confession of murder and concealment of the body in those places, they were convicted, and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death, to that of perpetual imprisonment; which

as to one only of them was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of an animal. The prisoners had been advised by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance for life was by a commutation of punishment, and that this depended on their making a penitential confession, and there-upon obtaining a recommendation to mercy (*p*).

A more recent case which created some stir at the time, and appears to have ended in a miscarriage of justice, illustrates the extraordinary ideas which induce persons to make false confessions. In April, 1879, two men, named Brannagan and Murphy, were convicted at Newcastle Assizes of burglary, with shooting, at Edlingham Vicarage. In the autumn of 1888, nearly ten years later, two men, named Edgell and Richardson, confessed that they committed the crime, and they were convicted and sentenced to five years penal servitude, while Murphy and Brannagan, who had received life sentences, were pardoned and compensated. In February, 1889, several police officers were charged with perjury at the first trial in 1879. Edgell and Richardson were the principal witnesses against

(*p*) 1 Greenleaf's L. of Ev. § 214, note; and see the case of the *Perrys*, *infra*, p. 282, and an American case in Wharton's Criminal L. of the U. S. p. 315, and a case mentioned in 1 Leach, C. C. p. 264, note.

them, and upon cross-examination admitted that they had been told by a solicitor, before they confessed, that they could not be punished, as two other men had already been convicted of the same offence (*q*). The police were acquitted, Mr. Justice Denman saying, in his summing up, that he had seldom seen a case in which the conclusion seemed more certain than in the trial of 1879, and suggested that the case against Murphy and Brannagan was, at the time he was speaking, even stronger than in 1879, when they were convicted. There was a general opinion at the time that the confession of Edgell and Richardson was part of a scheme to get the other two men released.

The State Trials contain numerous confessions of witchcraft, and abound with absurd and incredible details of communications with evil spirits, which

(*q*) A curious vulgar error; a distortion of the fact that the same person cannot be tried twice for the same offence. A remarkable instance of it occurred after the trial of four men at the Derby Autumn Assizes, 1889, before Wills, J., for a violent assault upon a constable during a poaching affray (*Reg. v. Shaw and others*, 13 Dec. 1889). They were convicted. Soon after their conviction, two or three other men, believing that they could not be tried for the offence of which Shaw and his companions had been convicted, began to boast that it was they who had beaten the constable. A petition was then presented to the Home Secretary on behalf of the convicted men, and a prosecution of the second batch was instituted. This case was tried before Hawkins, J. The manner in which the evidence of the confessions had been obtained by the solicitor who had defended the first four men was open to serious observation, and the second set were acquitted. Enough, however, had been ascertained in the course of the most careful and elaborate inquiries instituted by the Home Office to make it doubtful, at least, whether the evidence of the injured constable as to the identity of the first four men could be relied upon; and they were released.

only show that the parties were either impostors, or the involuntary victims of invincible self-delusion. One kind of false confession, that namely of being a deserter, is so common, as to have been made the subject of penal repression by rendering the offender liable to be treated as a rogue and vagabond, and to be imprisoned for any period not exceeding three months (*r*).

A distinguished foreign lawyer well observes, that "whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic, and should be regarded as offensive to the intelligence both of the Court and jury" (*s*).

It is essential to justice, that a confessional statement, if it be consistent, probable, and uncontradicted, should be taken together, and not distorted, or but partially adopted. "It is a rule of law," said Lord Ellenborough, "that when evidence is given of what

(*r*) 44 & 45 Vict. ch. 58, sections 27 (3) and 152 (The Army Act, 1881), following 20 Vict. ch. 13, s. 49, which was repealed by 38 & 39 Vict. ch. 66.

(*s*) 1 Hoffman's Course of Legal Study, 367.

a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them ; but you may still judge to what parts of the whole you can give credit ; and also whether that part which appears to confirm and fix the charge does not outweigh that which contains the exculpation" (*t*). On the trial of a man for a murder committed twenty-four years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended, and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole ; and that so qualified, it did not in fairness amount to an admission of the guilt of murder (*u*) ; and where the prisoner's declaration, in which she asserted her innocence, was given in evidence, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration. But where there is, in the whole case, no evidence but what is compatible with the assertion of innocence, adduced in evidence for the prosecution, the judge will direct an acquittal (*x*). In the case of Strahan

(*t*) The Trial of Lord Cochrane (*Rex v. De Berenger and others*, 3 M. & S. 67), Gurney's Shorthand Report, p. 479. A recent account of this famous trial will be found in Lord Cochrane's Trial before Lord Ellenborough, by J. B. Atlay (1897).

(*u*) *Rex v. Clewes*, 4 C. & P. 221, and Shorthand Report.

(*x*) Per Garrow, B., cited in *Rex v. Jones*, 2 C. & P. 629.

and Paul, on a charge of selling and converting to their own use bonds, with which they were entrusted for safe custody as bankers, it was unsuccessfully contended, that the admission made by the prisoner Strahan must be accepted in its entirety or not at all, and that it would then fairly and reasonably lead to the conclusion that he had known nothing of the fraudulent transactions in which the other prisoners were the leading actors, in March, 1854; but Mr. Baron Alderson told the jury that they were not bound to believe either the whole or any part of the statement made by the prisoner Strahan, and that they must take it with this consideration as one of the circumstances of the case and no more (y).

Of the credit and effect due to a confessional statement the jury are the sole judges: they must consider the whole confession, together with all the other evidence in the case, and if it is inconsistent, improbable, or incredible, or is contradicted or discredited by other evidence, or is the emanation of a weak or excited state of mind, they may exercise their discretion in rejecting it, either wholly or in part, whether the rejected part make for or against the prisoner (z). On the trial of a man for setting fire to a stack of hay, it appeared that between two and three o'clock in the morning, a police constable attracted by the cry of fire went to the spot, close to which he met the prisoner, who told him that a haystack was

(y) *Reg. v. Strahan and others*, C. C. C. Oct. 1855. Sessions Papers, vol. 42.

(z) *Rex v. Higgins*, 3 C. & P. 603; *Rex v. Steptoe*, 4 C. & P. 397; 1 Greenleaf's L. of Ev., § 218.

on fire, and that he was going to London ; the policeman asked him to give information of the fire to any other policeman he might meet, and to request him to come and assist. Shortly afterwards, on his way towards London, the prisoner met a serjeant of police whom he informed of the fire, stating that he was the man who set the stack on fire, upon which he was taken into custody. The serjeant of police, on cross-examination by the prisoner, stated that the magistrates entertained an opinion that he was insane, and directed inquiries to be made, from which it appeared that he had before been charged with some offence and acquitted on the ground of insanity. When apprehended, the prisoner appeared under great excitement ; and upon his trial he alleged that he had been confined two years in a lunatic asylum, and had been liberated only about a year ago ; that his mind had been wandering for some time ; and that passing by the place at the time of the fire, he was induced, in a moment of delirium, to make this groundless charge against himself. He begged the Court to explain to the jury the different result that would follow from his being acquitted on the ground of insanity and an unconditional acquittal ; and said that rather than the former verdict should be returned, which would probably have the effect of immuring him in a lunatic asylum for the rest of his life, he would retract his plea of not guilty, and plead guilty to the charge. Mr. Justice John Williams in summing up remarked, that there did not appear to be the least evidence against the prisoner except his own statement ; and that it was for the jury to say under all the

circumstances whether they believed that statement was founded in fact, or whether it was, as the prisoner alleged, merely the effect of an excited imagination and weak mind. The prisoner was acquitted (*a*).

It is obvious that every caution observed in the reception of evidence of a direct confession, ought to be more especially applied in the admission and estimation of the analogous evidence of statements which are only indirectly in the nature of confessional evidence; since such statements, from the nature of the case, must be ambiguous, or relate but obscurely to the *corpus delicti*. "Hasty confessions," says Sir Michael Foster, "made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported,—whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction, and withal this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted" (*b*). "How easy is it," it has been admirably said, "for the hearer to take one word for another, or to take a word in a sense not intended by the speaker, and for want of an exact representation of the tone of voice, emphasis,

(*a*) *Reg. v. Wilson*, Maidstone Wint. Ass. 1844. The same view was adopted by Wilde, L. C. J., in a case of arson at Maidstone Spring Assizes, 1847, where the prisoner to conceal his disgrace refused to give his name.

(*b*) Foster's Discourses on the Crown Law. Disc. I. ch. 3, p. 243; and see 1 Greenleaf's L. of Ev. § 214.

countenance, eye, manner and action of the one who made the confession, how almost impossible it is to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust and under apprehension for the wrong it may do" (c).

Upon the trial of a man for the murder of a woman, who had been brutally assaulted by three men, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the prisoner's name, from which circumstance suspicion attached to him. A person deposed that he met the prisoner at a public house, and asked him if he knew the woman who had been so cruelly treated, and that he answered, "Yes, what of that?" The witness said, that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes, I was; and what then?" or, as another account states, "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but, influenced by this imprudent language, the jury convicted him, and he was executed. The real offenders were discovered about two years afterwards, and two of them were executed for this very offence, and admitted their guilt; the third having been admitted to give evidence for the Crown (d).

(c) In *Resp. v. Fields*, Peck's Rep. 140, quoted in 1 Taylor's L. of Ev., 9th ed., p. 555.

(d) *Rex v. Coleman*, Kingston Spring Ass., 1749. 4 Celebrated Trials, 344.

But in the most debased persons there is an involuntary tendency to truth and consistency, except when the mind is on its guard, and studiously bent upon concealment ; and this law of our nature sometimes gives rise to minute and unpremeditated acts of great weight. In the memorable case of Eugene Aram, who was tried in 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of his accomplice, led to his conviction and execution. About thirteen years after the time of Clark's being missing, a labourer, employed in digging for stone to supply a limekiln near Knaresborough, discovered a human skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark, on the night before he was missing. The latter was summoned to attend the inquest, and discovered signs of uneasiness : at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, " This is no more Daniel Clark's bone than it is mine ; " from which it was concluded, that if he was so certain that the bones before him were not those of Clark, he could give some account of him. He was pressed with this observation, and, after various evasive accounts, he stated that he had seen Aram kill Clark, and that the body was buried in St. Robert's Cave, with the head to the right in the turn at the entrance of the cave, and upon search, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it.

Aram was consequently apprehended and tried at York in 1759, Houseman being the sole witness against him. He was convicted and executed, after having made a confession of the crime (*e*).

A remarkable fact of the same kind occurred in the case of one of three men convicted, in February, 1807, of a murder on Hounslow heath. In consequence of disclosures made by an accomplice, a police-officer apprehended the prisoner four years after the murder on board the 'Shannon' frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been about three years before; to which he answered that he was employed in London as a day-labourer. He then asked him where he had been employed that time four years: the man immediately turned pale, and would have fainted away had not water been administered to him. These marks of emotion derived their weight from the latency of the allusion—no express reference having been made to the offence with which the prisoner was charged—and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period (*f*).

The conduct of a person accused of a crime, the

(*e*) *Life and Trial of Eugene Aram, 1759.* Best edition printed at Richmond, 1832. See *Ann. Reg.* 1759, p. 360: 4 *Celebrated Trials*, 243, and *Dict. of Nat. Biog.*, article *Aram*.

(*f*) *Rex v. Haggerty and others*, 6 *Celebrated Trials*, 19; and *O. B. Sessions Papers, 1807*.

things he says and does, or the letters he writes, are often important pieces of indirect confessional evidence, which may prove his guilt conclusively. On the morning of Oct. 21st, 1891, at about 3 A.M., a young woman named Clover, who lived in Lambeth, was taken violently ill, and died at about 9 A.M. A local practitioner gave a certificate of death from syncope caused by *delirium tremens*. No suspicion of foul play was aroused, and the girl was buried without any further inquiry. In the following spring suspicions accumulated against a man known as Dr. Neill with regard to the deaths of other women, and on May 5th, 1892, Clover's body was exhumed, and an examination showed that death had undoubtedly been caused by strychnine. Up to within a week or so previously there had been no suggestion that the woman had died anything but a natural death, and strychnine had not been mentioned at all. Upon the trial of this man in October, 1892, for the murder of Clover, the most striking evidence against him was, that about a week after Clover's death he asked his landlady's daughter to go up to the house where Clover had lived, as he had heard that a girl had been poisoned there, and he wanted to know if that was the case. His request was refused, and no further notice of it was taken at the time. On Nov. 26th, 1891, a well-known West-end doctor received a letter (undoubtedly in prisoner's handwriting) stating that Clover had been poisoned with strychnine, accusing the doctor of murder, and demanding £2,500 as the price of silence. This letter the doctor immediately sent to the police, but after a few attempts to discover the author, it was

considered as a mere mad attempt to levy blackmail. When the murder was subsequently discovered and investigated, it became obvious that these statements, made at a time when there was no suggestion of murder, and when no one in the world except the murderer could have known that strychnine was the cause of death, were the strongest possible evidences of guilt. The prisoner was convicted and executed, and had undoubtedly been the author of other similar crimes perpetrated for the purposes of levying blackmail (*g*).

To this head may be referred the acts of concealment, disguise, flight, and other indications of mental emotion usually found in connection with guilt (*h*). By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted (*i*); and the officer always, until the abolition of the practice by statute (*k*), called upon the jury, after verdict of acquittal, to state whether the party had fled on account of the charge. These several acts in all their modifications are indications of fear; but it would be harsh and unreasonable to

(*g*) *Reg. v. Neill or Cream*, C. C. C. *cor.* Hawkins, J. See *The Times*, Oct. 18th *et seq.*, 1892. Sessions Papers, vol. 116, 14.

(*h*) See *Rex v. Crossfield*, 26 St. Tr. 216 *et seq.*

(*i*) "For he hath done what in him lay to stop the course of public justice." See Foster's Discourses on the Crown Law, Disc. I. chaps. ii. and iii. pp. 272 and 286. *Cf.* Co. Litt. s. 745, p. 391a; Co. Rep. XII. 121.

(*k*) 7 & 8 Geo. IV. cap. 28, § 5, which is itself repealed by the Statute Law Revision Act, 1888 (51 & 52 Vict. ch. 57), but so that the old law does not revive.

interpret them invariably as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty (*l*). Mr. Justice Abbott on a trial for murder where evidence was given of flight, observed in his charge to the jury, that "a person, however conscious of innocence, might not have courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight." "It may be," added the learned judge, "a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences; but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is" (*m*). In his charge to the jury upon

(*l*) Per Gurney, B., in *Reg. v. Belaney*; see pp. 336-343, *infra*, where the facts of this case are given at length.

(*m*) *Rex v. Donnell*, see pp. 331-336, *infra*.

the trial of Professor Webster for murder, Chief Justice Shaw of Massachusetts, said, "Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how an innocent or a guilty man ought or would be likely to act in such a case? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse" (*n*).

It is not possible to lay down any express test by which these various indications may be infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances. Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused, as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct

(*n*) Bemis's Rep. 486 (1850). Two other reports are extant of the same date, one printed in Boston and one in London.

apparently incompatible with innocence, and drawn down the unmerited infliction of the highest penalty. The inconclusiveness of these circumstances is strikingly exemplified by a case mentioned in a preceding page, where the magistrate was so fully convinced of the prisoner's innocence, that he allowed him to go at large on bail to appear at the assizes. The coroner's inquest having brought in a verdict of 'guilty' against him, he endeavoured to escape from the danger of a trial in the excited state of public feeling by flight; but was subsequently apprehended, convicted, and executed on a charge of murder, of which he was unquestionably guiltless (*o*).

In the endeavour to discover truth, no evidence should be excluded; but a case must be scanty of evidence which demands that any considerable importance should be attached to circumstances so fallacious as the acts in question. It has been observed, that if the evidence without them is sufficient, this species of evidence is unnecessary, and that if not, then the inferences from language, conduct, and behaviour, seem not of sufficient weight to give any conclusive effect to the other proofs (*p*). It is, in fact, a make-weight and nothing more; and care must always be taken that mere make-weights are not allowed to have an exaggerated effect.

(*o*) *Rex v. Coleman*, *vide supra*, p. 103; and see the case of *Rex v. Green and others*, 14 St. Tr. 1199, where several persons, one of whom had voluntarily surrendered, were convicted in Scotland and executed, at a period of great excitement against Englishmen, upon a groundless charge of piracy and murder.

(*p*) Per Shaw, C. J., in *Prof. Webster's case*, *vide supra*, pp. 108, 109.

## SECTION 7.

THE SUPPRESSION, DESTRUCTION, FABRICATION, AND  
SIMULATION OF EVIDENCE.

It is a maxim of law, that *omnia presumuntur contra spoliatores*, and the suppression or destruction of pertinent evidence is always therefore deemed a prejudicial circumstance of great weight; for as no action of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were produced, would operate unfavourably to the party in whose power it is to produce it, and who withholds it or has wilfully deprived himself of the power of producing it (*q*).

A chimney-sweeper having found a jewel, took it to a jeweller to ascertain its value; who, having removed it from the socket, gave him three-half-pence, and refused to return it. The friends of the finder encouraged him to bring an action against the jeweller; and Lord Chief Justice Pratt directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages (*r*). In an action of trover for a diamond necklace which had been unlawfully taken out of the owner's possession, it appeared that some of the diamonds were seen shortly afterwards in the defendant's possession, and that he could give no

(*q*) Starkie's L. of Ev., 4th ed. 1853, pp. 755 *et seq.*

(*r*) *Armory v. Delamirie*, 1 Strange, 505; and see *Rex v. Lord Melville*, 29 St. Tr. at col. 1456.

satisfactory account how he came by them : the jury were directed to presume that the whole set of diamonds had come to the defendant's hands, and that the full value of the whole was the proper measure of damages (*s*). On an ejectment involving the title to large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder : it was held that these circumstances raised a violent presumption of the defendant's knowledge of title in the plaintiff ; and the jury were directed that the suppressor and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence ; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual ; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and that they might expect satisfaction from him that his brother died without issue (*t*). On a bill filed against a defendant who had destroyed a deed by which the

(*s*) *Mortimer v. Craddock*, 12 L. J. N. S. (C. P.) 166.

(*t*) *Craig d. Annesley v. Earl of Anglesea*, 17 St. Tr. 1416 ; and see the *Tracy Peerage*, 10 C. & F. 154 ; *Clunnes v. Pezzey*, 1 Camp. 8 ; *Lawton v. Sweeney*, 8 Jurist, 964 ; *Greenleaf's L. of Ev. s. 37*.

plaintiff claimed under certain limitations a real estate, secondary evidence was given of the limitations in the deed ; but the evidence, as the witnesses gave it, was of limitations which could not legally take effect, being of a term of years after an indefinite failure of issue,—Sir Joseph Jekyll, the Master of the Rolls, said that as against the man who had destroyed the instrument which would have shown what the rights of the plaintiff were, he would presume even what the plaintiff had not proved, that the limitation was to take place after the failure of issue in the life-time of a person then in being (*u*).

The foregoing illustrations of the rule of evidence under consideration, are among the most remarkable recorded cases of its application ; nor are they the less pertinent because they arose in civil cases, since the general principles of evidence are the same in all cases, whether civil or criminal ; and no inconsiderable proportion of the criminal trials which occur, present examples of its practical bearing and effect (*x*).

Amongst the most forcible of presumptive indications may be mentioned, all attempts to pollute or disturb the current of truth and justice, or to prevent a fair and impartial trial, by endeavours to intimidate, suborn, bribe, or otherwise tamper with the prosecutor, or the witnesses, or the officers or ministers of justice, the concealment, suppression, destruction, or alteration of any article of real evidence ; any of which acts, clearly brought home to

(*u*) *Dalston v. Coatsworth*, 1 P. Wms. 731.

(*x*) *Rex v. Dela Motte*, 21 St. Tr. 810 ; *Rex v. Burdett*, 4 B. & Ald. atp. 122

the prisoner, or his agents, are of a most prejudicial effect, as denoting on his part a consciousness of guilt, and a desire to evade the pressure of facts tending to establish it (y). Perhaps in no case have circumstances of this kind told with such fatal effect as in that of Donellan, who was convicted of the murder of Sir Theodosius Boughton by poison. The prisoner, after having administered the fatal draught in the form of medicine, rinsed out the phial which had contained it, and when that fact was stated before the coroner, he was observed to check the witness by pulling her sleeve. In his charge to the jury, Mr. Justice Buller laid great stress upon that circumstance. "Was there anything so likely," said the learned judge, "to lead to a discovery as the remains, however small they might have been, of medicine in the bottle? But that is destroyed by the prisoner. In the moment he is doing it, he is found fault with. What does he do next? He takes the second bottle, puts water into that, and rinses it also. He is checked by Lady Boughton, and asked what he meant by it—why he meddled with the bottles. His answer is, he did it to taste it; but did he taste the first bottle? Lady Boughton swears he did not. The next thing he does, is to get all the things sent out of the room; for when the servant comes up, he orders her to take away the bottles, the basin, and the dirty things. He puts the bottles into her hand, and she was going to carry them away, but Lady Boughton stopped her. Why were all these things to be removed? Why

(y) *Rex v. Crossfield*, 26 St. Tr. 217; *Rex v. Donellan*, p. 324, *infra*; *Rex v. Donnell*, p. 331, *infra*; *Reg. v. Palmer*, p. 344, *infra*.

was it necessary for the prisoner, who was fully advertised of the consequence by Lady Boughton, to insist upon having everything removed? Why should he be so solicitous to remove everything that might lead to a discovery?" After dealing with the prisoner's conduct in other matters, the learned judge continued: "Then as to the conduct of the prisoner before the coroner. Lady Boughton had mentioned the circumstance of the prisoner's rinsing out the bottle—one of the coroner's jury swears that he saw him pull her by the sleeve. Why did he do that? If he was innocent, would it not be his wish and anxious desire, as he expresses in his letter, that all possible inquiry should be made? What passes afterwards? When they got home, the prisoner tells his wife that Lady Boughton had given this evidence unnecessarily; that she was not obliged to say anything but in answer to questions that were put to her, and that the question about rinsing out the bottles was not asked her. Did the prisoner mean that she should suppress the truth? that she should endeavour to avoid a discovery as much as she could by barely saying Yes or No to the questions that were asked her, and not disclose the whole truth? If he was innocent, how could the truth affect him? but at that time the circumstance of rinsing out the bottles appeared even to him to be so decisive that he stopped her on the instant, and blamed her afterwards for having mentioned it. All these," said the learned judge, "are very strong facts to show what was passing in the prisoner's own mind" (z).

(z) Gurney's Shorthand Report, referred to *supra*, p. 37. See p. 324, *infra*, for the facts of the case.

A boatman was convicted of stealing rum which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liverpool had taken a sample of the spirit and tested its strength : and upon delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat where the prisoner was, to require explanation ; but as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke three jars and emptied their contents, which by the smell were proved to be rum, into the canal (a).

In a case already mentioned, the prisoner, who was helping in the house of a medical man, had given to his wife a cup of tea, which tasted very hot and unpleasant. After taking it, the mistress had been very ill. A few days later the mistress was in the kitchen, and mixed herself some brandy and water in a cup. She went into the garden, leaving the teacup on the kitchen table. When she came back she tasted the brandy and water, and exclaimed, "What a disagreeable taste ; it is exactly like the tea." At that moment the prisoner drew the cloth off the kitchen table, and the teacup was broken. The pieces were thrown away, but afterwards recovered, when they were found to be coated

(a) *Rex v. Thomas*, Warwick Spring Ass. 1836, *coram* Bosanquet, J.

with a sediment which, upon being analysed, turned out to be corrosive sublimate (*b*).

Other facts of the same kind are the common cases of the obliteration, effacing, or otherwise removing marks of ownership or identity from plate, linen, or other articles of property, or of stains of blood, or other matter from the person or dress of the accused, or the suggestion or insinuation of false, groundless, or deceptive hypotheses, or explanations in order to neutralize or account for adverse facts or appearances. It is on the same principle that, by statute, if any person on board a vessel which is chased by an officer of the preventive service, shall throw overboard, stave, or destroy any part of her lading, the vessel is declared to be forfeited; and that goods liable to duty concealed on board any vessel are also declared to be forfeited (*c*); and that other similar statutable presumptions have been created; and that whenever absent witnesses are so mixed up with transactions before the Court as to give rise to comments on their not being present, it is the common practice to prove the cause of their non-attendance, as, for instance, death, illness, or their having quitted the country (*d*).

Another fact of this kind is the attempt to prevent *post-mortem* examination by the premature interment

(*b*) *Reg. v. Sarah Kibbler*, Warwick Autumn Ass. 1889, *coram* Wills, J.

(*c*) 8 & 9 Vict. c. 87. ss. 5 (*d*), 6, and 29. See now the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36). See §§ 177, 179, 180, 183, &c.

(*d*) Per Pollock, L. C. B., in *Cowper v. French*, Exch. N. P. July 10th, 1850.

of human remains, under the pretext that it is rendered necessary by the state of the body, since it cannot but be known that such examination will always furnish important, and generally conclusive, evidentiary matter as to the cause of death (*e*). So also is the concealment of death by the destruction or attempted destruction of human remains (*f*); but in this case the presumption of criminality results from the act of concealment rather than from the nature of the means employed, however revolting, which must be regarded only as incidental to the fact of concealment and not as aggravating the character and tendency of the act itself. Where a prisoner tried for murder admitted that he had cut off the head and legs from the trunk of a female, and concealed the remains in several places, but alleged that her death had taken place by accident while she was in his company, and that in the alarm of the moment, and to prevent suspicion, he had determined to conceal the death, Lord Chief Justice Tindal told the jury that the concealment of death under such circumstances, had always been considered to be a point of the greatest suspicion, but that this evidence must be received with a certain degree of modification, and especially in a case where the feelings might be excited by the singular means of concealment adopted by the prisoner; that this point of evidence was therefore for the consideration of the jury, and that it was for them to judge how far

(*e*) *Rex v. Donellan*, p. 324, *infra*; *Rex v. Donnall*, p. 331, *infra*; *Rex v. Palmer*, p. 344, *infra*.

(*f*) *Rex v. Gardelle*, 4 Celebrated Trials, 400; *Rex v. Cook*, p. 290, *infra*; *Reg. v. Good*, C. C. C. May, 1842.

it was a proof of the prisoner's guilt; but the mere general fact of the concealment, added the learned judge, is to be considered, and not the circumstances under which it took place (*g*).

So, too, in cases where it is a question whether death has occurred accidentally or from suicide, or is attributable to murder, concealment of the body is often a grave inculpatory fact. In a case tried at Edinburgh in 1889, it was proved that prisoner and the deceased, a man named Rose, who were casual touring acquaintances, took a lodging together, about July the 13th. On the 16th they climbed Goat Fell together. Late that night, prisoner, who had been using a false name, returned alone to the lodgings and carried off both his own and Rose's property, leaving the bill unpaid. Rose's body was afterwards found hidden by stones near a cliff over which he might have fallen in descending Goat Fell. The medical evidence was divided as to whether his injuries were more probably caused by a fall or by blows from a stone. The defence was that Rose met his death by an accident, that the prisoner had parted with him previously, and having decamped with his property, was afraid to come forward when inquiries were made. This theory left it unexplained as to how the body became covered up, or who did it, or what reason there was for doing it. The jury by a majority found the prisoner guilty of murder (*h*).

(*g*) *Rex v. Greenacre*, C. C. C. April, 1837, 8 C. & P. 35; and see *Professor Webster's case*, Bemis's Report, p. 109, *supra*.

(*h*) *Reg. v. Laurie*. See *Times*, November 9th and 11th, 1889.

Other such facts are the officious affectation of grief and concern as an artifice to prevent or avert suspicion (*i*), false representations as to the state of a party's health, or the utterance of obscure or mysterious predictions or allusions, the pretence of supernatural dreams, noises, or other omens or intimations, calculated to prepare the connections for the event of sudden death, and to diminish the surprise and alarm which naturally follow such an event. A woman who was convicted of murder, about a month before the catastrophe told the mother of an infant child whom, as well as her own husband and child, she poisoned, that she had had her fortune told, and that within six weeks three funerals would go from her door, those of her husband and son and the child of the person she was addressing (*j*).

A case tried in the Supreme Court of Massachusetts affords a useful illustration of the value of this kind of evidence. Sarah Jane Robinson, a widow, was charged with the murder of her brother-in-law, Freeman, by arsenical poisoning. Freeman had a wife and two children, and in 1882 his life was insured for two thousand dollars. The prisoner knew this. She was in urgent want of money, and the motive suggested for the crime was to get this insurance money. In order to prove her guilty intention, evidence was admitted that in February, 1885, Mrs. Freeman was taken ill with pneumonia,

(*i*) *Rex v. Blandy*, 18 St. Tr., 1118 ; *Rex v. Patch*, p. 390, *infra*.

(*j*) *Rex v. Holroyd*, 6 Cel. Tr. 167. And see *Rex v. Donellan*, p. 324, *infra*; and *Rex v. Donnall*, p. 331, *infra*. See also *Reg. v. Sarah Kibbler*, pp. 67, 63, *supra*, and p. 122, *infra*.

and was recovering until the prisoner came to nurse her, after which she developed symptoms of arsenical poisoning and died; but the doctor at the time certified death from pneumonia. During Mrs. Freeman's illness, and after her death, the prisoner asked various people to persuade Freeman to come and live with her instead of with his own sister. Immediately after the funeral she urged Freeman to assign the policy of insurance to her. He went to live with her, and assigned the policy to her on May 13th. During Mrs. Freeman's illness, and when she seemed likely to recover, the prisoner said that she had dreamed that Mrs. Freeman would die. After Freeman came to live with her she began to abuse him, and say he would be better dead. On June 17th she sent him to see his mother, "because they might never meet again." For about three weeks before his death the prisoner professed that she had had "warnings" that Freeman would die. On Monday, June 22nd, Freeman was taken ill, and prisoner at once said he would never leave the house alive. She attended him until Friday. On that night his sister sat up with him, and gave him his medicine. On Saturday morning he was better, but relapsed about noon, and died before midnight. He died of arsenical poisoning. During the illness she expressed anxiety about the insurance money, as she had failed to get her husband's insurance. In September she received the insurance money, and instead of investing it for Freeman's child (one had died) she used it to pay her own debts. There was no evidence that prisoner had arsenic in her possession at any

time, and she went into the box and contradicted much of this evidence, but she was convicted and sentenced to death (*k*). A woman who was convicted of administering poison with intent to murder had told a witness, at a time when the intended victim had nothing very serious the matter with her, that she was not likely to recover, for that footsteps had been heard on the landing when nothing could be seen, and that that was a token of death (*l*).

The fabrication of simulated facts and appearances calculated to create alarm, or otherwise to give a delusive tendency and interpretation to inculpatory facts, is an artifice frequently resorted to, for the avoidance, neutralization, or explanation of circumstances naturally presumptive of guilt; the resort to which is of the most prejudicial criminative tendency, inasmuch as it necessarily implies an admission of their truth, and a consciousness of the inculpatory effect, if uncontradicted or unexplained, of the facts which it thus seeks to divest of their natural significance. As instances of such simulated facts may be mentioned the pretence of having partaken of a poisonous draught which has caused death (*m*); the self-infliction of slight wounds to raise the inference that the offender had himself been the object of deadly attack (*n*); the attempt to fix guilt or suspicion upon others by the groundless suggestion of

(*k*) The official report of the trial of *Sarah Jane Robinson*, Boston, 1880.

(*l*) *Reg. v. Sarah Kibbler*, Warwick Autumn Ass., 1889, *coram* Wills, J.

(*m*) *Rex v. Nairn and Ogilby*, 19 St. Tr. 1284; *Reg. v. Wescombe*, Exeter Sum. Ass. 1839.

(*n*) *Reg. v. Bolam*, Durham Sum. Ass. 1839.

malicious feelings (*o*) ; the placing of a razor, pistol, or other weapon in the hand of or near to a dead body to lead to the notion of suicide, and many other such acts. But cunning is “a sinister or crooked wisdom,” and not unfrequently the very means employed to prevent suspicion, lead to the discovery of the real truth. A murderer, to simulate the appearance of suicide, placed a razor in the left hand of a right-handed woman (*p*). A man was found shot, and his own pistol lying near him ; but, although no person had been seen to leave the house, the suspicion of suicide was negatived by the fact that the ball was too large to have entered the pistol (*q*).

A very remarkable case of this kind is recorded in the State Trials, which was tried at Hertford Assizes, 4 Car. I., before Mr. Justice Harvey. A woman was found dead in her bed, with her throat cut, and a knife sticking in the floor. Several persons of the family who slept in the adjoining room deposed that the deceased went to bed with her child, her husband being absent, that the prisoners slept in the adjoining room, and that no person afterwards came into the house. The coroner’s jury were inclined to return a verdict of *felo de se*, but suspicion being excited against these individuals, the jury, whose verdict was not yet drawn up in form, desired that the remains of the deceased might be taken up, and accordingly, thirty days after her death, they were taken up, and the jury charged the prisoners with

(*o*) *Rex v. Patch*, p. 390, *infra*.

(*p*) *Rex v. Fitter*, Warwick Sum. Ass. 1834, *coram* Taunton, J.

(*q*) Paris and Fonblanque, Medical Jurisprudence, vol. iii. p. 39.

the murder. Upon their trial they were acquitted, but so much against the evidence, that the judge let fall his opinion that it were better an appeal (*r*) were brought than so foul a murder should escape unpunished. Accordingly an appeal was brought by the child against his father, grandmother, and aunt, and her husband. On the trial of the appeal before Chief Justice Hyde, the evidence adduced was, that the deceased lay in a composed manner in her bed, with the bedclothes undisturbed, that her child lay by her side, that her neck was broken, and that her throat was cut from ear to ear. There was no blood in the bed, except a tincture on the bolster where her head lay. From the bed's head there was a stream of blood on the floor, which ran along till it pounded in the bendings of the floor, and there was another stream of blood on the floor at the bed's foot, which pounded also on the floor to a very great quantity; but there was no communication of blood between these two places, nor upon the bed. A bloody knife was found in the morning sticking in the floor, at some distance from the bed; but the point of the knife, as it stuck, was towards the bed, and the handle from the bed; and there was the print of the thumb and fingers of a left hand. It was beyond all question, from the circumstances, that the deceased had been murdered, for if she had committed suicide by cutting her own throat, she could not by any possibility have broken her own

(*r*) For an account of this obsolete process—a survival of the primitive trial by battle—see *Ashford v. Thornton*, 1 B. & Ald. 405; see p. 249, *infra*. The history of the subject will be found in Pollock and Maitland Hist. Eng. Law ii. 464—481; also Hawk P. C. ii. c. 23; Stephen Hist. Cr. Law of England i. 244—50.

neck in bed. The father, grandfather, and aunt were convicted and executed (s).

In a more recent case the evidence, otherwise doubtful, was rendered quite conclusive by the forgery and fabrication of a letter by the accused. The prisoner was charged with the murder of his wife by arsenical poisoning. The defence was suicide. He had been married twelve years, lived happily with his family, and had an excellent character, and although empty arsenic paper was found in his pocket, his explanation was reasonable, and he was away from home at the time when his wife was first taken ill, while others had opportunities of administering the poison. There was little or no motive shown for the crime, and had the case rested there, the prisoner would probably have been acquitted. But it was proved that soon after the wife's death, he took a purse out of her pocket, and pretended to discover a letter written by her to her sister-in-law which amounted to a confession that she had taken her own life. There was evidence that this letter was in the prisoner's own handwriting, and it was inconsistent with the woman's dying statements and with other circumstances in the case. He was convicted, and before execution confessed both the murder and the forgery (t).

An unsuccessful attempt to establish an *alibi* is always a circumstance of the greatest weight against

(s) *Rex v. Okeman and others*, 14 State Trials 1324; 10 Hargrave's State Trials, App. ii. p. 29.

(t) *Reg. v. Beamish*, Warwick Winter Assize 1861, *coram* Willes, J. See *Times*, December 19th, 1861. Ann. Reg. 1861, p. 250.

the prisoner, because the resort to that kind of defence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them if they remain uncontradicted. This defence is frequently fabricated, and is liable to many sources of fallacy, which will be more appropriately considered in a subsequent part of this essay; and a learned judge has said, that if the defence turns out to be untrue, it amounts to a conviction (*u*). But it must not be overlooked that—such is the weakness of human nature—there have been cases where innocence, under the pressure of menacing appearances, has fatally committed itself, by the simulation of facts for the purpose of evading the force of circumstances of apparent suspicion. When the defence of an *alibi* fails, it is generally on the ground that the witnesses are disbelieved and the story considered to be a fabrication; and from the facility with which it may be fabricated, it is commonly entertained with suspicion, and sometimes, perhaps, unjustly so (*x*).

Circumstances such as those which have been enumerated are justly considered to be incompatible with integrity and innocence, and referable to a consciousness of guilt and to a desire to evade the force of facts indicative of it; and they consequently subject the party guilty of them to very unfavourable and injurious inferences.

Occasionally facts are suppressed or tampered

(*u*) Per Daly, B., in *Rex v. Killen*, 28 St. Tr. 1040.

(*x*) See *Rex v. Robinson*, Old Bailey Sess. Papers, 1824.

with by those concerned in the prosecution, and then the same presumption arises, and generally tells with great force against a case which receives such support. It is customary on every criminal charge to give evidence of the arrest of the prisoner, and of his answer upon arrest to the charge. When evidence of this kind is omitted without adequate explanation, it is always a circumstance of suspicion. A remarkable instance of the kind occurred at the Leeds Spring Assizes, 1886. A man was tried for rape. The evidence appeared almost conclusive. The prisoner alleged consent, which was indignantly repudiated by the prosecutrix—a married woman living with her husband, in whose house the offence was alleged to have been committed. The husband denied that he had ever suspected or accused his wife of infidelity with the prisoner. The case concluded with the evidence of a police inspector who received the prisoner into custody at the station, but without the evidence of the constable who effected the arrest. The judge insisted upon the constable being sent for, and adjourned the case for some hours for that purpose, keeping the jury together (as was then necessary on such a charge) in the meantime. When the constable arrived he proved that on the night of the alleged rape he had been in the street where the prosecutrix and her husband lived, when the husband and wife were having a violent altercation, the husband having turned her into the street, alleging that he had caught her with the prisoner under the most compromising circumstances. Some two hours afterwards the husband and wife had come to him on his beat and made an accusation

of rape against the prisoner. There was no doubt that the constable's evidence had been deliberately suppressed, and the prisoner was acquitted (*y*).

## SECTION 8.

### STATUTORY PRESUMPTIONS.

UPON the principle of the rule of presumption against persons in whose possession the fruits of crime are discovered recently after its commission, many acts have been constituted legal presumptions of guilt by statute, so as to throw the onus of rebutting or displacing such presumptions upon the party accused; such, for example, among many others, as the making or possessing, or buying or selling coining tools or instruments (*z*); the possession of forged bank-notes, knowing the same to be forged, without lawful excuse (*a*); the possession of public stores under the control of any Secretary of State or public department (*b*); the acting or behaving as the master or mistress of a disorderly house (*c*); the finding of instruments of gaming in any places suspected to be used as a common gaming-house (*d*), and the being found by night in possession, without lawful excuse, of any picklock, key, crow, jack, bit, or other instrument of housebreaking (*e*). The

(*y*) *R. v. Eli Gledhill*, May 21st, 1886, *coram* Wills, J.

(*z*) St. 2 W. IV. c. 30, s. 10. See now 24 & 25 Vict. c. 99, s. 24.

(*a*) St. 11 G. IV. and 1 W. IV. c. 66, ss. 12—19, and 28. See now 24 & 25 Vict. c. 98, ss. 13 and 45.

(*b*) St. 9 & 10 W. III. c. 41; and 39 & 40 G. III. c. 89. See now the Public Stores Act, 1875 (38 & 39 Vict. c. 25, s. 7)

(*c*) St. 21 G. III. c. 49.

(*d*) St. 8 & 9 Vict. c. 109.

(*e*) St. 14 & 15 Vict. c. 19, s. 1. See now 24 & 25 Vict. c. 96, s. 58.

revenue laws abound with similar instances of presumptions created for the purpose of protecting the public against infractions of those laws.

By a remarkable anomaly, probably grounded upon some supposed analogy to the rule alluded to, the sale by a shopman of a book or newspaper containing libellous matter, was formerly held to constitute a presumption of publication by the authority of the master, although no evidence were given to show that the sale was with his authority or privity ; it being, however, open to him to contradict such presumption by evidence that the sale was in fact unauthorized, and was not within the scope of the general instructions given to the shopman (*f*). This carried the doctrine of criminal liability to an unwarrantable extent. Lord Campbell's Act (*g*), passed in 1843, has brought this part of our law into harmony with the other parts of the system, by providing that whensoever, upon any trial of any indictment or information for the publication of a libel under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to him to prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care on his part.

(*f*) *Rex v. Almon*, 20 State Trials, 803, at cols. 838 and 842. S. C. 5 Burr. 2686. *Rex v. Cuthell*, 27 State Trials, 641, is also a good illustration of the Common Law, and is notable for Lord Erskine's speech on behalf of the defendant. Cf. *Reg. v. Holbrook*, 3 Q. B. D. 60 ; 47 L. J. Q. B. 35, and 4 Q. B. D. 42 ; 48 L. J. Q. B. 113.

(*g*) St. 6 & 7 Vict. c. 96, s. 7. For the liability in civil cases, see

Of statutory presumptions this general notice is sufficient, as it is the object of this essay to consider the natural connection between facts and the presumptions to which they naturally lead, and not to enumerate the presumptions created by positive law (*h*).

It is evident that all such arbitrary presumptions depend for their reasonable force and authority upon the obnoxious character *per se* of the particular actions or circumstances which are thus made the foundations of legal presumptions—upon their strict connection with and relation to some specific legal offence, or the intention to commit such offence—and upon the facility of proof by the accused of matter of legal excuse where such matter exists.

In the interpretation of laws which create positive presumptions of guilt, it is essential to distinguish between the letter and the spirit of the enactment; to such laws the maxim of the Civil Law is specially pertinent, "*scire leges non est earum verba tenere, sed vim ac potestatem*" (*i*). It is not practicable to anticipate all the cases which may fall within the language of the rule, or to anticipate the necessary exceptions which a proper regard to the intention of the legislature would exclude from its operation, and which it is reasonable to conclude that the legislature would have expressly excluded

*Emmens v. Pottle*, 16 Q. B. D. 354; *Vizetelly v. Mudie's Select Library*, 1900, 2 Q. B. 170.

(*h*) See a copious collection of such presumptions in 1 Taylor's *L. of Ev.*, 9th ed. 1895, Part I., ch. 5.

(*i*) Digest. I. iii. 17.

if they had been foreseen. However peremptory and apparently conclusive, therefore, the language of such enactments may be, it is not allowed to exclude or control the just force and operation of such concomitant circumstances as tend to repel the presumption of the *malus animus* arising from the bare facts which constitute the presumption (*k*).

These considerations introduce us to what is known as the doctrine of "*mens rea*," after Lord Coke's famous maxim, "*actus non facit reum, nisi mens sit rea*." It is a general and fundamental rule that the mind must be at fault before there can be a crime, and criminal statutes must usually be construed with that qualification. But it is not an inflexible rule: a statute may relate to such a subject-matter, and may be so framed as to make an act criminal whether there has been an intention to break the law or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, and other matters necessary for the general welfare, health, or convenience, and the breach of them constitutes an offence, and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it has *bonâ fide* made an accidental miscalculation or an erroneous measurement.

Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported

(*k*) Puffendorf, lib. v. c. 12; cf. 2 East, P. C. 765.

into the construction of criminal statutes that there must be a guilty mind, must depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable (*l*). Regard must be had to the scope of the Act, and to the object for which it was apparently passed (*m*). A few illustrations of the application of these principles will be useful, and will show how difficult it is to lay down any absolute rule on the subject.

A widow woman was indicted before Mr. Justice Foster under 9 & 10 Wm. III. c. 41 (*n*), for having in her custody divers pieces of canvas marked with the king's mark, she not being employed by the Commissioners of the Navy to make the same for the king's use. The canvas was marked as charged in the indictment, and was clearly proved to be such as was made for the use of the navy, and to have been found in the defendant's custody. She did not attempt to show that she was within any exception of the Act, as being a person employed to make canvas for the navy; nor did she offer to produce any certificate from any officer of the crown, touching the occasion of such canvas coming into her possession. Her defence was, that when there happened to be in his Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons entrusted with the stores

(*l*) Per Wills, J., in *Reg. v. Tolson*, L. R. 23 Q. B. D. at p. 173.

(*m*) Per Stephen, J., *ibid* at p. 191.

(*n*) This has been repealed, and its place is now taken by the Public Stores Act, 1875 (38 & 39 Vict. c. 25 s. 7).

to make a public sale of them in lots larger or smaller, as best suited the purpose of the buyers ; and that the canvas produced in evidence, which had been made up long since, some for table-linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death ; and upon his death came to the defendant, and had been used in the same open manner by her to the time of prosecution. The counsel for the crown insisted that as the Act allows of but one excuse, the defendant, unless she could avail herself of that, could not resort to any other ; that, if the canvas were really bought of the commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase, and that the second section admits of no other excuse. But the learned judge was of opinion, that though the clause of the statute which directs the sale of these things had not pointed out any other way of indemnifying the buyer than the certificate, and though the second section seemed to exclude any other excuse for those in whose custody they should be found, yet still the circumstances attending every case which might seem to fall within the Act, ought to be taken into consideration ; otherwise a law calculated for wise purposes, might, by a too rigid construction of it, be made a handle for oppression. There was no room to say that this canvas came into the possession of the defendant by any act of her own ; it was brought into family use in the lifetime of her husband, and continued so to the time of his death ; and by act of law it came to her. Things of that kind have frequently been exposed

to public sale ; and though the Act pointed out an expedient for the indemnity of buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested by the Act. And if the defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury ; and directed them, that if upon the whole evidence they were of opinion that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they would acquit her ; and she was accordingly acquitted (*o*).

On the other hand, where a woman was indicted under 8 & 9 Vict. c. 100, s. 44, for receiving more than two lunatics into a house not duly licensed, and the jury found that she did receive more than two persons who were lunatics, but that she believed honestly and on reasonable grounds that they were not lunatics, Mr. Justice Stephen held this to be immaterial, having regard to the scope and objects of the Act, and his ruling was upheld (*p*). Another important case to the same effect is where a man was convicted under 24 & 25 Vict. c. 100, s. 55, of taking an unmarried girl under the age of sixteen

(*o*) Foster's Discourses on the Crown Law, 3rd ed. 1792, App. p. 439. And see 2 East, P. C. 756. See also per Lord Kenyon in *Rex v. Banks*, 1 Esp. 144, and Coltman, J., in *Reg. v. Wilmot*, 3 Cox, C. C. 281, similar cases founded upon the same statute.

(*p*) *Reg. v. Bishop*, 5 Q. B. D. 259.

years out of the possession and against the will of her father. The evidence showed that the girl had gone to the prisoner willingly, and told him that she was eighteen, and the jury found that he believed her statement, and that the belief was reasonable. The case was argued before all the judges, who by a majority of fifteen to one upheld the conviction, basing their decision partly upon the history and scope of the Act, and partly upon the ground that even if the girl had been eighteen, the man had done a thing which was wrong in itself. The judges fully recognize the doctrine of *mens rea*, which formed the basis of a lengthy dissentient judgment from the late Lord Esher (q).

In 1889 this question was again very fully debated over a case of bigamy. The defendant married Tolson in 1880, and was deserted by him in 1881. She and her father made inquiries about him, and learned from his brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. Six years after his disappearance she married another man, who knew all these circumstances. Tolson afterwards returned. The woman was indicted for bigamy under section 57 of the same Act (be it noted) upon which the indictment in the last case was framed, and was convicted, the jury stating, in answer to a question put by Mr. Justice Stephen for the purpose of raising the point, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the

second marriage. The Court for Crown Cases Reserved, consisting of fourteen judges, was divided in opinion, the majority of nine holding that the *bona fide* belief in the death of the husband was a good defence in spite of the clear words of the statute, the reasoning being that the presumption of guilt raised by a statutory prohibition cannot be decided without reference to surrounding circumstances (*r*).

Upon an indictment under the statute 5 & 6 Wm. IV. c. 19, which makes it a misdemeanour in the master of a vessel to leave a seaman behind, and enacts that the only defence which he can set up is the production of the certificate of the consul or other party mentioned in the statute, it was held nevertheless that a defendant might show that it was impracticable to obtain such certificate (*s*), and this qualification has been introduced into subsequent statutes, 7 & 8 Vict. c. 112, s. 48; 17 & 18 Vict. c. 104, s. 208; and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 188), which is the present code on this subject (*t*).

(*r*) *Reg. v. Tolson*, 23 Q. B. D. 163.

(*s*) *Reg. v. Dunnett*, 1 C. & K. 425.

(*t*) It is impossible in a work of this kind to discuss all the recent cases which deal with the doctrine of *mens rea* in relation to statutory offences. At common law it was no defence to an indictment for a public nuisance (*e.g.* obstructing the highway) that the defendant did not know of it, or that his servants committed it contrary to his express orders. This was the one exception where the civil doctrine of *respondeat superior* was applied criminally. (Cf. *Reg. v. Stephens*, L. R. 1 Q. B. 702.) This is perhaps the clue to the kind of offences under modern statutes to which an innocent mind is no defence. Many acts which are not criminal in any real sense of the word are made punishable, in the public interest as quasi-public nuisances, upon summary conviction (cf. *Coppen v. Moore*, No. 2, 1898,

## SECTION 9.

## SCIENTIFIC TESTIMONY.

THE testimony of skilled or scientific witnesses constitutes a very important source of circumstantial evidence, especially in regard to the proof of the *corpus delicti* in cases of suspected homicide, and in inquiries whether a person is *doli capax*. Such evidence in its details belongs to other departments of science; but as the principles which govern its reception and application fall exclusively within the province of jurisprudence, some general observations upon it are necessary.

If it be true that proof is nothing more than a presumption of the highest order (*u*), *a fortiori* is such the case with respect to the testimony of skilled or scientific witnesses, which not unfrequently presents a sequence of presumptions grounded upon conflicting opinions, even with regard to the actual state of science. Such testimony is therefore, in its very nature, *sui generis*, and, according to the attainments, means of knowledge, and character of the

2 Q. B. 306), and, following out the analogy of an indictment for nuisance, there are cases where the proceedings are criminal in form, but are really only a summary mode of enforcing a civil right. (Cf. per Wright, J., in *Sherras v. De Rutzen*, 1895, 1 Q. B., at p. 922.) The absence of *mens rea* has been held to be no defence under the Sale of Food and Drugs Act; see *Betts v. Armstead*, 20 Q. B. D. 771; *Pain v. Boughtwood*, 24 Q. B. D. 353: while it was a defence under the Licensing Acts in *Sherras v. De Rutzen* (*supra*), and *Somerset v. Wade*, 1894, 1 Q. B. 574, and under the Contagious Diseases (Animals) Act in *Nichols v. Hall*, L. R., 8 C. P. 322. See also other cases cited in these references. Cf. pp. 28 and 131, *supra*.

(*u*) See p. 41, *supra*.

witness, may be of little moment, or deserving of entire and undoubting confidence.

Science, moreover, is never final, and new facts are every day found to disturb or modify long-established convictions. Thus Reinsch's test, which had long been confidently employed for the separation of arsenic, was, in an important case in the year 1859, discovered to be fallacious without precautions which had not been usual, and it was shown that arsenic found in the particular mixture which was there in question had been set free from the copper employed in the experiment (*x*).

In many countries, this kind of testimony, technically termed *expertise*, is invested with a sort of semi-official authority, and special rules are laid down for the estimation of its proving force (*y*). By the law of England, however, no peculiar authority is given to the testimony of witnesses of this description; its value is estimated by the same general principles as are applied in estimating the capacity, credit, and weight of all other witnesses (*z*), and the Courts have wisely repelled all attempts to depart from the established and ordinary rules of evidence and judgment. On a trial for murder, before Lord Chief Justice Tindal, several medical witnesses, who had been present during the

(*x*) *Reg. v. Smethurst*, C. C. C. Aug. 1859, Sess. Papers. The prisoner was convicted, but was subsequently granted a free pardon, presumably on the ground that the medical and chemical evidence was not satisfactory. See Taylor's Medical Jurisprudence, 4th ed. 1894, vol. i. p. 199.

(*y*) *Traité de la Preuve*, par Mittermaier, c. 26.

(*z*) See Best on Evidence 8th ed. 1893, pp. 465-471.

trial and heard the whole of the evidence, but had no other means of forming an opinion on the question, were admitted to testify that in their judgment the prisoner was insane. But the propriety of admitting such evidence having been made the subject of discussion in the House of Lords, the question was submitted to the judges, who were of opinion that a medical witness could not in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or whether he was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusions, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science—as to which such evidence is admissible—but that where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as matter of right (*a*).

On a subsequent occasion, Mr. Baron Alderson, with the concurrence of Mr. Justice Cresswell, refused to allow a witness to be asked whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner at the time he committed the

(*a*) *Reg. v. M<sup>r</sup> Naghten*, 10 Cl. & F. 200-211; 1 C. & K. 130, note (*a*); 8 Scott, N. R. 595.

act was of unsound mind, and said that the proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner; but to take the course suggested, he said, was really to substitute the witness for the jury, and allow him to decide upon the whole case; that the jury must have the facts before them, and that they alone must interpret them by the general opinions of scientific men (*b*). Upon a trial for murder, where the death was alleged to have been caused by suffocation, a physician who had attended in court and heard the evidence, was asked his opinion as to the cause of death; but Mr. Justice Patteson expressed himself very strongly upon the unsatisfactory nature of such evidence, the witness not having seen the body, and his opinion being founded on the facts stated by other witnesses (*c*). These cases have been followed by a series of determinations in which such evidence has been held to be inadmissible (*d*).

The reasonable principle appears to be, that scientific witnesses shall be permitted to testify only to such matters of fact as have come within their own cognizance, or as they have acquired a knowledge of by their reading, and to such inferences from them, or from other facts provisionally assumed

(*b*) *Reg. v. Frances*, 5 Cox, C. C. 57.

(*c*) *Reg. v. Newton*, Shrewsbury Spring Assizes, 1850, see pp. 148-154, *infra*.

(*d*) *Reg. v. Pate*, C. C. C. 12 July, 1850; *Doe d. Bainbridge v. Bainbridge*, 4 Cox, C. C. 454; *Reg. v. Layton*, *ib.* 149; *Sills v. Brown*, 9 C. & P. 601.

to be proved, as their particular studies and pursuits specially qualify them to draw ; so that the jury may thus be furnished with the necessary scientific *criteria* for testing the accuracy of their conclusions, and enabled to form their own independent judgment by the application of those *criteria* to the facts established in evidence before them.

But where the witnesses are men of unquestionable character and ability, it can hardly be material whether the question is asked in a more or less direct form ; especially as there can be no difficulty in so shaping the question as to mask, while it substantially involves, the precise objection ; and in several subsequent cases medical witnesses have been permitted without objection to give their opinions as to the sanity of parties charged with crime, as grounded upon the evidence that had been adduced both for the prosecution and the defence. Such evidence is however technically irregular, and an objection to it must, if made, prevail (*e*). In other medical cases, as for instance where there is a charge of negligence against a medical man or in any case involving scientific opinion, the proper way to elicit the witness's evidence is to put a hypothetical case to him assuming a state of facts identical with those admitted or proved before the Court, and to ask his opinion on those facts. Such a course is free from objection, and an answer so obtained is more satisfactory than an opinion grounded upon what the witness may have heard, the value of which

(*e*) *Reg. v. Baranelli*, C. C. C. Ap. 1855 ; *Reg. v. Westron*, C. C. C. Feb. 1856 ; Starkie's *L. of Ev.*, 4th ed. 175, note (*z*).

entirely depends upon how much he heard or took in (f).

It is scarcely necessary to add, that scientific evidence, being generally matter of opinion, can seldom be implicitly adopted. Lord Cottenham said, he had seen enough of professional opinions to be aware that in matters of doubt, upon which the best constructed and best informed minds may differ, there is no difficulty in procuring opinions on either side (g).

A learned writer on the Law of Scotland observes, that "there is perhaps no kind of testimony more subject to bias in favour of the adducer than that of skilled witnesses; for many men, who would not willingly misstate a simple fact, can accommodate their opinions to the wishes of their employers, and the connection between them tends to warp the judgment of the witnesses without their being conscious of it; and hence skilled witnesses, in questions of handwriting, can usually be got in equal numbers on either side; and engineers are more frequently like counsel for their employers than like witnesses giving their real opinions on oath" (h). Nor is it possible, after the discreditable exhibitions which have occasionally taken place in our Courts of justice, to restrict the foregoing reproaches to

(f) *Fenwick v. Bell*, 1 C. & K. 312; *Malton v. Nisbet*, 1 C. & P. 72; *Rex v. Wright*, R. & R. 456.

(g) *In re Dyce Sombre*, 1 Mac. & G. at p. 128.

(h) 2 Dickson's Law of Evidence in Scotland, § 1999, p. 996; and see the language of Lord Campbell in *The Tracy Peerage*, 10 C. & F. 191.

witnesses taken from the particular professions which have been enumerated. Happily, however, such cases are but exceptional ; and true scientific knowledge, under the government of high principle, is of the greatest value, as subsidiary to the ends of justice (i).

Some valuable remarks upon this kind of evidence were made by Lord Chief Justice Cockburn, upon a trial for murder, at Taunton Spring Assizes, 1857. The murder was effected by cutting the throat. A knife was found on the person of the prisoner, with stains of blood upon it ; and it was contended that the murder had been effected with this weapon, while it was alleged on the part of the prisoner that it had been used for cutting raw beef. A professional analyst called on the part of the prosecution stated that the blood had not coagulated till it was on the knife, that the knife had been immersed in *living* blood up to the hilt, and that it was not the blood of an ox, a sheep, or a pig. His opinion was grounded upon the relative sizes of the globules of blood in man and other animals, that of man being stated to be 1-3400th of an inch, of the ox 1-5300th, of the sheep 1-5200th, and of the pig 1-4500th, the relative sizes being as 53 to 34 in the ox, 52 to 34 in the sheep, and 45 to 34 in the pig. The learned judge said, " The witness had said the blood on the knife could not be the blood of an animal as stated by the prisoner, and took upon himself to say that it was not the blood of a dead animal ; that it was living blood,

(i) On the subject of scientific evidence, see *infra*, Ch. VII. s. 4 (poisoning), and *ibid.* s. 5 (infanticide).

and that it was human blood, and he had shown them the marvellous powers of the modern microscope. At the same time, admitting the great advantages of science, they were coming to great niceties indeed when they speculated upon things almost beyond perception, and he would advise the jury not to convict on this scientific speculation alone." The case was conclusive on the general evidence (*k*).

The net result of scientific research would appear to be roughly as follows (*l*) :—

There are three classes of tests for the discovery of blood in spots and stains. Spectroscopic examination may ascertain in a very reliable way the presence of blood even in very minute quantities. If the suspected matter gives the characteristic spectra in each of a certain series of experiments made under well-known conditions, it is certain that blood is present, and some estimate can be formed of the probable age of the bloodstain.

(*k*) *Reg. v. Nation*, Taylor's Medical Jurisprudence, 4th ed. 1894, vol. i. pp. 560 and 600. As to the extent to which such evidence can be relied upon, see *ibid.* at pp. 594-604.

(*l*) Dr. Dupré, F.R.S., has kindly revised the statements in the text as to the detection of bloodstains, and the Editor is indebted to him for this and the two following notes.

In the first place, whilst the solution is being prepared for examination, the time taken for the colouring matter to dissolve in some measure indicates the age of the stain. As a rule the fresher the blood the more readily does the colouring matter dissolve; the older the blood the slower the process of solution. In the second place, recent bloodstains give the absorption spectrum of hæmoglobin; bloodstains which have been exposed for some time to the action of the air give the absorption spectrum of methæmoglobin; still older stains that of hæmatin. See also an important note p. 423, *infra*.

Chemical tests will detect the presence of blood and may be relied upon if the suspected matter answers throughout the series to the behaviour, under like conditions, of blood. But with either method the mere fact that some small proportion of the tests fails to produce the definite and characteristic results sought will not suffice to negative the presence of blood.

Microscopical examination may satisfactorily establish the presence of red corpuscles which are found in nothing but blood; but much of its value depends upon the freshness of the matter to be examined. Whilst the microscopic identification of blood corpuscles is a positive proof of the presence of blood, the failure to find any is by no means conclusive of its absence. Much the same may be said with regard to the spectroscopic examination. Practically the only tests capable of proving the negative are chemical tests. If *every* chemical test yields a negative result, no blood can be present, whether the stain be new or old, provided that a fair amount of material be available for examination. The best negative test, however, is the identification of the substance constituting the stain. Microscopic examination does not interfere with the subsequent application to the same matter of chemical or spectroscopic investigation, and it should therefore be the first applied where the material is scanty in quantity (*m*). All three methods should be used in important investigations.

(*m*) Spectroscopic analysis destroys the blood corpuscles; microscopic examination has no such consequence and therefore does not affect subsequent examinations, spectroscopic or chemical.

The examination of blood recently shed presents fewer difficulties than that of old blood, but unless the blood corpuscles have been broken down by decomposition or by application of water (*n*), and have so lost their characteristic appearance, the mere age of the bloodstain, even though considerable, does not prevent the satisfactory application of microscopic investigation. Upon neither spectroscopic nor chemical nor microscopic examination can much reliance be placed unless it has been made by a person thoroughly well versed in the use and practice of the method in question. No known processes have at present satisfactorily distinguished between human blood and that of the other mammalia (except camels), but mammalian blood can be conclusively distinguished from that of birds, fishes and reptiles.

The following cases are remarkable as exemplifying the inconclusiveness of scientific evidence, when uncorroborated by conclusive facts, physical or moral.

A young man was tried for the murder of his brother, who resided with their father, and overlooked his farm. The prisoner, who lived about twenty miles from his father's house, went on a visit to him, and on the day after his arrival his brother was found dead in the stable, not far from a vicious mare, with her traces upon his arm and

(*n*) Blood corpuscles are so extremely minute that they cannot easily be destroyed by mechanical violence, whereas when placed in contact with water they swell up and burst in a very short time.

shoulders ; two other horses were in the stable, but they had their traces on. Suspicion fell upon the prisoner, who was on bad terms with his brother, and the question was whether the deceased had been killed with a spade, or by kicks from the mare ? The spade was bloody, but it been inadvertently used by a boy in cleaning the stable ; and the cause of death could only be determined by the character of the wounds. There were two straight cuts on the left side of the head, one about five and the other about two inches long, which had apparently been inflicted by a blunt instrument. On the right side of the head there were three irregular wounds, two of them about four inches in length, partaking of the appearances of both lacerated and incised wounds. There was also a wound on the back part of the head, about two inches and a half long. There was no swelling around any of the wounds, the integuments adhering firmly to the bones ; and, except where the wounds were inflicted, the fracture of the skull was general throughout the right side, and extended along the back of the head toward the left side, and a small part of the temporal bone came away. The deceased was found with his hat on, which was bruised, but not cut, and there were no wounds on any other part of the body. Two surgeons expressed a positive opinion that the wounds could not have been inflicted by kicks from a horse, grounding that opinion principally on the distinctness of the wounds, the absence of contusion, the firm adherence of the integuments, and the straight lateral direction and similarity of the wounds ; whereas, as they stated, the deceased

would have fallen from the first blow if he had been standing; and if lying down, the wounds would have been perpendicular; and moreover they were of opinion that the wounds could not have been inflicted if the hat had been on the deceased's head without cutting the hat, and that he could not have put on his hat after receiving any of the wounds. The learned judge, however, stated that he remembered a trial at the Old Bailey where it had been proved that a cut and a fracture had been received without having cut the hat; and evidence was adduced of the infliction of a similar wound by a kick without cutting the hat. The prisoner was acquitted (o).

A woman who was tried for the murder of her mother, had lived for nine or ten years as house-keeper to an elderly gentleman, who was paralyzed and helpless; the only other inmate being another female servant, who slept on a sofa in his bedroom to attend upon him. The deceased occasionally visited her daughter at her master's house, and sometimes stopped all night, sleeping on a sofa in the kitchen. She came to see her daughter about eight o'clock one night in December, 1848; the other servant retired to bed about half-past nine, leaving the prisoner and her mother in the kitchen, and she afterwards heard the prisoner close the door at the foot of the stairs, which was usually left open that they might hear their master if he wanted assistance. The prisoner usually slept upstairs.

(o) *Rex v. Booth*, Warwick Spring Assizes, 1808, *coram* Wood, B.

About two o'clock in the morning the other servant was aroused by the smell of fire, and a sense of suffocation, and found the bedroom full of smoke; upon which she ran downstairs, finding the door at the bottom of the stairs still closed. As she went downstairs she saw a light in the yard, and she found the kitchen full of smoke, and very wet, particularly near the fireplace, as also was the sofa, but there was very little fire in the grate. She then unfastened the front door, and ran out to fetch her master's nephew, who lived near, and who hastened to the house. He found the front door fastened, but was admitted by the prisoner at the back door. He at once hastened upstairs, and ascertained that his uncle was safe, and then came down into the kitchen, where he found the sofa was on fire, and threw some water upon it. He then went to let the servant girl, who had fetched him, in at the front door, which he found bolted, and not merely latched. He then again went upstairs with the servant to his uncle's room, and they raised him up in bed, and saw that he was all right. On returning to the kitchen, they found the place was very wet; a little fire was still smouldering on the sofa, which they at once extinguished. The pillows and entire back part of the sofa-cover were burnt to the breadth of a person's shoulders.

The prisoner then came in from the back premises in her night-dress; she was described as not drunk, but not quite sober. She took a bottle of rum from the cupboard, and drank from it, and after that she soon became thoroughly intoxicated, and lay down on the sofa. The girl then went out of the

kitchen towards the brewhouse, and found the deceased lying on her face on the steps of the brewhouse, apparently burnt to death. Her arms were crossed in front over her breast, or, according to one witness, across her face; on the back of the head lay a piece of the sofa-cover, and near the body was a cotton bag which had been used in the house indiscriminately as a bag or a pillow; it was besmeared with oil. Near the feet of the body were the remains of four pairs of sheets which had been in the kitchen the night before. They were almost entirely consumed by fire; what was left of them was wet. The prisoner's clothes were on a chair in the kitchen—the explanation being given that she was in the habit of undressing there. Holes had been burnt through them, and it was found that the prisoner's hands were scorched and blistered, and that she had burns on her arms and body corresponding with the burns in her clothes. It appeared from the state of the bedclothes in her room upstairs that she had not been in bed, but there was a mark as if someone had been lying upon the bed. A butter-boat, which had been full of dripping, and a pint bottle, which had been nearly full of lamp-oil, and left near the fire overnight, were both empty, and there were spots of grease and oil on the pillow-case, sheets, and sofa. A stocking had been hung up to cover a crevice in the window-shutter, through which any person outside might have seen into the kitchen. The door-post of the kitchen leading into the yard was much burnt about three feet high from the ground; and there was a mark of burning on the door-post of the brewhouse. The surface of the

deceased woman's body was completely charred, the tongue was livid and swollen, and one of the toes was much bruised, as if it had been trodden on. There was a small blister on the inner side of the right leg, far below where the great burning commenced, which contained straw-coloured *serum*, but there was no other blister on any part of the body, nor any marks of redness around the blister, or at the parts where the injured and uninjured tissues joined. The nose, which had been a very prominent organ during life, was flattened down so as not to rise to more than the eighth of an inch above the level of the face, and as it never recovered its original appearance, it was stated that it must have been so flattened for some time before death. The lungs and brain were much congested, and a quantity of black blood was found in the right auricle of the heart.

From these facts the medical witnesses examined in support of the prosecution concluded, that the deceased had been first suffocated by pressing something over her mouth and nostrils so forcibly as to break and flatten the nose in the way described; but they had made no examination of the larynx and trachea, and other parts of the body. A physician who had heard the evidence but not seen the deceased, gave his opinion that the appearances described by the other witnesses were signs of death by suffocation; that the absence of vesication, and of the line of redness were certain signs that the body had been burnt after death; but he added that, as there were no marks of external injury, an examination should have been made of the parts of the body above mentioned, in order

to arrive at a satisfactory conclusion. Another medical witness thought it possible that suffocation might have been produced by the flames preventing the access of air to the lungs, while others again thought it impossible that such could have been the case, as no screams had been heard in the night, and they were also of opinion that if alive the deceased must have been in such intense agony that she could not, even if she had been strong enough to walk from the kitchen to the brewhouse, have refrained from screaming. One of these witnesses stated that he did not think it possible that the deceased, if alive, could have fallen in the position in which she was found, as her first impulse would have been to stretch out her arms to prevent a fall ; but, on the other hand, it was urged that it was not possible to judge of the acts of a person in the last agonies of death by the conduct of one in full life. Under the will of her grandfather the prisoner was entitled on the death of her mother to the sum of £200, and to the interest of the sum of £300 for her life. She had frequently cruelly beaten the old woman, threatened to shorten her days, bitterly reproaching her for keeping her out of her property by living so long, and declared that she should never be happy so long as she was above-ground, and she had once attempted to choke her by forcing a handkerchief down her throat, but was prevented from doing so by the other servant. The magistrates had been frequently appealed to, but they could only remonstrate, as the old woman would not appear against her daughter.

The case set up on behalf of the prisoner was,

that she was in bed and, perceiving a smell of fire, came downstairs, and finding the sofa on fire, fetched water and extinguished it, and that she knew nothing of her mother's death until she heard it from others. It appeared that the old woman was generally very chilly, and in the habit of getting near the fire ; that on two former occasions she had burned portions of her dress ; that on another she had burned the corner of the sofa-cushion ; that she used to smoke in bed, and light her pipe with lucifer matches, which she carried in a basket ; and that on the night in question she had brought her pipe, which was found on the following morning in her basket. It was urged as the probable explanation of the position in which the body was found, that, finding herself on fire, she must have proceeded to the brewhouse, where she knew there was water, and leaned in her way there against the doorpost, and that, feeling cold in the night, she had wrapped the sheets around her, and did not throw them off until she reached the yard. The prisoner, though accustomed to sleep upstairs, was in the habit of undressing in the kitchen, which was stated to be the reason why the stocking had been so placed as to prevent any person from seeing into the kitchen.

Mr. Justice Patteson, in his charge to the jury, characterized the evidence of the medical practitioners who had examined the body as extremely unsatisfactory in consequence of the incompleteness of their examination ; the opinion of the physician who had not seen the body was also, he said, very unsatisfactory as substituting him for the jury ; that

he had only expressed his opinion as founded upon the facts stated by the other witnesses ; that if he had seen the body himself, his views might have been materially different ; that the other witnesses might have omitted to mention particulars which he might deem of the greatest importance, but which they considered as of no significance ; that therefore opinions expressed on such partial statements ought to be received with the greatest reluctance and suspicion ; that he had always had a strong opinion against such evidence, as tending to encroach upon the proper duty of juries ; and he recommended them to exercise their own judgment upon the other evidence in the case, without yielding it implicitly to the authority of this witness. The jury acquitted the prisoner ; and indeed it would have been contrary to all principle to do otherwise, in the midst of so much uncertainty as to the *corpus delicti* (p).

(p) *Reg. v. Newton*, Shrewsbury Spring Assizes, 1850. Two former juries, at the Assizes in the preceding year, had been unable to agree, and had been discharged—a circumstance unparalleled, it is believed, in English jurisprudence.

## AMERICAN NOTES.

[NOTE TO CHAPTER III.]

### *Motive — In General.*

"When there is a question whether any act was done by any person, the following facts are deemed to be relevant ; that is to say — any fact which supplies a motive for such an act, or which constitutes preparation for it; any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person." Stephen's Dig. Evid. Art. 7.

Motive may be shown (*e. g.*, by proof of criminal relations between the victim and the wife of the accused). *Martin v. State*, 9 Circ. Dec. 621, 17 Ohio Circ. Ct. 406.

Motive cannot generally be shown directly. It is to be inferred from facts proved. *John v. Bridgman*, 27 Ohio St. 43.

It may however be testified to directly by the person who did the act. *Coal Co. v. Davenport*, 37 Ohio St. 194; *Mitchell v. Ryan*, 3 Ohio St. 377, 385.

To show a person's motives, his own prior declarations are admissible, there being at the time they were made no object apparent in falsifying. *McCracken v. West*, 17 Ohio, 16.

Facts supplying a motive may be shown in connection with other evidence. *State v. Palmer*, 65 N. H. 216; *Dodge v. Carroll*, 59 N. H. 237; *State v. Watkins*, 9 Conn. 52, 54; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Bradford*, 126 Mass. 42; *Com. v. Abbott*, 130 Mass. 472; *Com. v. Choate*, 105 Mass. 451; *Com. v. Hudson*, 97 Mass. 565; *Com. v. Vaughan*, 9 Cush. (Mass.) 594; *Scott v. People*, 141 Ill. 195; *Benson v. State*, 119 Ind. 488; *Tucker v. Tucker*, 74 Miss. 93, 32 L. R. A. 623; *State v. Glahn*, 97 Mo. 679; *Moore v. U. S.*, 150 U. S. 57; *Alexander v. U. S.*, 138 U. S. 353.

That the victim had been pressing the accused for payment of a debt is relevant, as showing motive, in a trial for murder. *Com. v. Webster*, 5 Cush. (Mass.) 295.

The fact of excessive insurance may be shown at the trial of the owner of a house, who is charged with unlawfully burning it, as it tends to supply a motive. *Com. v. McCarthy*, 119 Mass. 354; *State v. Cohn*, 9 Nev. 179.

Evidence of motive must not be too remote. *Com. v. Abbott*, 130 Mass. 472.

Defendant's motive for shooting deceased may be shown to have arisen from a woman's remark that he ought to whip the deceased. *People v. Gallagher*, 78 N. Y. Supp. 5.

The admission by defendant that one adequate motive exists does not prevent proof of another by the State. *Com. v. Spink*, 137 Pa. St. 255.

In *Butler v. State* (Ark.), 63 S. W. 46, a father's motive for murdering his daughter was shown to be that he feared she would join the Mormon church as her mother had done.

#### *Motive of Third Person to Procure Murder.*

The motive for homicide may be shown to be the hatred of a third person for the deceased, and that the defendant was procured by such third person to do the act. *Story v. State*, 68 Miss. 609.

#### *Probative Value of Motive.*

The value of a motive to do an act, as a circumstance from which to infer guilt, is much less where it is one which would be likely to appeal to a large number of persons. The fact that the defendant, charged with larceny, desired to become rich, is of little weight to prove his guilt. Millions have the same desire. The same principle applies in trials for rape and similar cases. *Com. v. Hudson*, 97 Mass. 565.

#### *Motive not Admissible until Defendant is Shown to Have Known Fact.*

The fact that the deceased was prosecuting the defendant for blackmail cannot be proved as a motive for killing the deceased, unless it is shown that the defendant knew of such prosecution. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

The circumstance which is alleged to have been the cause of the defendant's desire to commit the crime charged must be shown to have been known by him, otherwise it could not have been his motive. *State v. Shelton*, 64 Iowa, 333 ; *Son v. Terr.*, 5 Okl. 526.

*Lapse of Time as Affecting Motives.*

The commission of other crimes, and the fear of their discovery by the deceased, may be proved as a motive to murder. "Nor can we sanction the views of the learned counsel that these collateral crimes were too remote in time to furnish any motive for the commission of the crime here charged. Motive may or may not be affected by the lapse of time. Ordinarily, a man who had committed a murder twenty years in the past would be just as much concerned to prevent exposure and punishment for that crime as though it were but one year in the past. And in this case, if the discovery by Mrs. Kent, at the time of her death, of these dark and criminal spots in her husband's life, would have been just as galling and humiliating to him as if discovered the first year of their married life, then his motive to prevent such discovery would be just as strong at the former time as at the latter." *State v. Kent*, 5 N. D. 516 (wife murder).

*Necessity of Proving Motive.*

"Appellant further urges that the evidence fails to disclose any motive for the crime ; that proof of motive is essential to support conviction, and that therefore the judgment must be reversed. If by this is meant that proof of a particular motive must be as clear and cogent as proof of the crime, the proposition finds no support in either reason or authority. To the act of every rational human being pre-exists a motive. In every criminal case, proof of the moving cause is permissible, and oftentimes is valuable ; but it is never essential. Where the perpetration of a crime has been brought home to the defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory, and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally

a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction." *People v. Durrant*, 116 Cal. 179, 207.

Proof of a motive is always admissible, but may not be necessary to establish the guilt of the accused. *Prentice, J., in State v. Rathbun*, 74 Conn. 524, says: "The State was under no obligation to show a motive for the commission by the accused of the crime charged, much less a sufficient or adequate one. While it is a recognized rule of human conduct that crime is the response of the evil mind to some temptation, and that men of sound mind are rarely, if ever, prompted to commit crime without some impelling motive, it does not follow, and it is not the law, that the prosecution, to justify a conviction in a given case, must be so successful in fathoming the mysteries of the human mind and in revealing the possibly hidden secrets influencing it as to develop and disclose to the jury a motive sufficient and adequate for the commission of the offence. . . . The other evidence may be such as to justify a conviction without any motive being shown. It may be so weak that, without a disclosed motive, the guilt of the accused would be clouded by a reasonable doubt."

Motive need not be proved in order to sustain a conviction for murder. *People v. Owens*, 132 Cal. 469.

#### *Failure to Prove Motive.*

The fact that the State has failed to prove a motive should not be given weight by the jury. *Brunson v. State (Ala.)*, 27 So. 410.

The State has no need to prove a motive where the evidence of defendant's guilt is conclusive without it. *People v. Minisci*, 12 N. Y. St. R. 719; *Thurman v. State*, 32 Neb. 224.

Proof of a motive is never indispensable. *People v. Robinson (N. Y.)*, 1 Parker Cr. R. 649.

#### *Absence of Motive.*

The absence of a motive raises no presumption of innocence, but is merely one circumstance to be weighed by the jury. *Salm v. State*, 89 Ala. 56.

#### *Desire for Wealth.*

The motive for committing a larceny is usually a desire for wealth quickly and easily obtained; so also is it in burglary and robbery, and often in arson, homicide, and other crimes.

*Financial Necessity of the Accused.*

The state of the defendant's bank account and his need of money may be shown on his trial for killing his mother. *Com. v. Twitchell*, 1 Brewst. (Pa.) 551.

On question of forgery of a bill, evidence that at about the time the bill is dated the signer tried to borrow money, is relevant. *Stevenson v. Steward*, 11 Pa. 307.

The defendant accused of setting fire to a building may be shown to have insured the building and to have been insolvent. *People v. Fitzgerald*, 46 N. Y. Supp. 1020.

Where the State alleged that the deceased was killed to prevent the exposure of the defendants as guilty of larceny with which he had charged the deceased, it was allowed to be shown that the defendant had been short of money. *State v. Miller*, 156 Mo. 76.

*To Secure Life Insurance.*

Evidence to show that motive for murder was to secure life insurance held admissible. *Com. v. Clemmer*, 190 Pa. 202.

It may be shown that defendant had a plan to secure insurance money payable on the death of A to his wife, by first killing the wife, then inducing A to make the policies payable to the defendant, and then killing A. *Com. v. Robinson*, 146 Mass. 571. And see *Shaffner v. Com.*, 72 Pa. 60, 13 Am. Rep. 649.

The deceased may be shown to have been insured in favor of the defendant. *State v. Rainsbarger*, 74 Iowa, 196.

It may be shown that four persons had a scheme whereby two were to procure insurance on the life of another and the other two were then to kill that other. *Brandt v. Com.*, 94 Pa. 290.

*Motives for Arson.*

Anger at his wife and her intention of getting a divorce as a motive for burning the house. *People v. Hiltal*, 131 Cal. 577.

The securing of insurance money may be shown to have been the object for which the accused burned certain buildings. *Knights v. State (Neb.)*, 78 N. W. 508.

Ill-will toward an agent of the owner of property is not admissible as a motive for burning the property. *State v. Battle*, 126 N. C. 1036.

*Robbery and Homicide.*

Where the alleged motive for a homicide is robbery, it may be shown that the deceased had money and that the defendant knew it, or that he had proposed to rob the deceased. *Byers v. State*, 105 Ala. 31; *Stafford v. State*, 55 Ga. 591; *State v. Jackson*, 95 Mo. 623; *Kennedy v. People*, 39 N. Y. 245; *Howser v. Com.*, 51 Pa. 332.

Also the deceased may be shown to have had money, when circumstances are proved making it probable that the defendant knew the fact. *Marable v. State*, 89 Ga. 425.

In addition it may be shown that the defendant had been in need of money and had said so (*People v. Wolf*, 95 Mich. 625), and that the defendant paid certain debts about the time of the homicide, or had an unusual sum of money in his possession. *Clough v. State*, 7 Neb. 320; *State v. Wintzingerode*, 9 Ore. 153.

The fact that the deceased had money may be shown in connection with proof that his purse was found near where his body lay. *State v. Donnelly*, 130 Mo. 642.

The defendant may be shown to have known where the deceased kept his money. *Ettinger v. Com.* 98 Pa. 338.

To prove motive in trial for homicide the State may prove how much money deceased had. *Donnelly v. State*, 26 N. J. L. 610.

Proof was made that the deceased's books showed that he should have had \$1,200 at the time of his death, while he was later found to have only \$400, that the defendant had been hard up, and that immediately after the homicide he paid a number of his creditors. *State v. Rice (Ida.)*, 66 Pac. 87.

The State may show that the deceased was generally reputed to have money, and that she distrusted banks, and that the defendant knew it, as a motive for robbery and murder. *Musser v. State (Ind.)*, 61 N. E. 1.

Where the motive for the homicide was the money which deceased was going to draw from a bank, the State may show the amount on deposit there. *State v. Lucey (Mont.)*, 61 Pac. 994.

*To Escape the Burden of Supporting Deceased.*

It may be shown that defendant had by deed agreed to support the deceased during the remainder of his life. *Davidson v. State*, 135 Ind. 254.

*To Conceal Defalcations.*

The defendant, charged with the destruction of certain books of account for the purpose of concealing his defalcation, may be shown to have been gambling shortly before the event. *McElhannon v. State* (Ga.), 26 S. E. 501.

*Previous Relations between Deceased and Defendant—In General.*

The previous relations existing between the defendant and the deceased, unfriendly feelings, anger in arguments, concealed marriage, illicit intercourse, and the like, may be proved as bearing upon the motives tending to crime. *State v. Seymore*, 94 Iowa, 699; *Sillberry v. State*, 133 Ind. 677; *O'Brien v. Com.*, 89 Ky. 354; *State v. Stackhouse*, 24 Kan. 445; *Com. v. Costley*, 118 Mass. 1; *People v. Lyons*, 110 N. Y. 618; *McWeen v. Com.*, 114 Pa. 300; *Boyle v. State*, 61 Wis. 440.

The deceased may be shown to have had the accused arrested on a charge of bastardy, and that the accused had paid a sum of money to settle the case. *Franklin v. Com.*, 92 Ky. 612.

A quarrel between the defendant and the wife of the deceased was admitted as a motive for homicide. *Gravely v. State*, 45 Neb. 878.

To show the motive of a slave for mixing poison with the food prepared by her for her owner, her conduct, disobedient acts, and discontent may be proved, as also the fact that the owner had sexual intercourse with her. *Josephine v. State*, 39 Miss. 613.

*Revenge.*

Defendant's motive for killing the deceased was shown to be the fact that defendant had just served a term in the penitentiary for burglary of the deceased's house. *Powell v. State*, 13 Tex. App. 244.

It may be shown that the deceased had planned to help the defendant's wife elope with another man, in order to show a motive for homicide. *Cheek v. State*, 35 Ind. 492.

In *State v. Morris*, 84 N. C. 756, it was shown that the defendant and the deceased had been indicted for larceny and that the latter had turned State's evidence.

To show that the defendant had a motive for the murder of his wife, it may be proved that she had sued for a divorce. *Com. v. Madan*, 102 Mass. 1; *Binns v. State*, 57 Ind. 46.

Trouble with defendant's employer as motive for arson. *Meeks v. State* (Ga.), 30 S. E. 252.

#### *Discharge of Employee.*

It may be shown that the defendant had been in the employ of the deceased and had been discharged. *Morrison v. State*, 84 Ala. 405.

#### *Deceased a Witness in Another Case.*

To prove homicide, the deceased may be shown to have been a witness or the prosecutor against the defendant in another case. *Childs v. State*, 55 Ala. 25 (prosecution for stealing corn); *Turner v. State*, 70 Ga. 765 (indictment for another murder); *Butler v. State*, 91 Ga. 161 (prosecution for adultery with daughter of deceased); *Martin v. Com.*, 93 Ky. 189 (indictment for robbery); *Gillum v. State* 62 Miss. 547 (illegal liquor selling); *State v. Morris*, 84 N. C. 756 (deceased was State's evidence in larceny case).

It may be shown that the deceased was to be a witness against the defendant in a suit for divorce on the ground of adultery. *Com. v. Madan*, 102 Mass. 1.

#### *Neighborhood Feud.*

The existence of a neighborhood feud may be shown, and the fact that the defendant and the deceased belonged to different sides. *State v. Helm*, 97 Iowa, 378.

To show a feud between the families as a motive for murder, the State may show that immediately after shooting the deceased he shot again and wounded deceased's mother. *People v. Walters*, 98 Cal. 138.

Previous quarrels in which the deceased killed a relative and a friend of the defendant may be proved to show defendant's motive for killing deceased. *Kelsoe v. State*, 47 Ala. 573.

#### *Jealousy.*

The defendant in homicide may be shown to have been rejected and the deceased to have been accepted by the same girl (*Hunter*

*v. State*, 43 Ga. 483; *McCue v. Com.*, 78 Pa. 185; 21 Am. Rep. 7), or the defendant may be shown to have been jealous of the deceased and to have quarrelled with a woman about him. *Com. v. McManus*, 143 Pa. 64, 14 L. R. A. 89.

*Unrequited Love.*

It may be shown that the defendant killed the deceased because she refused to cohabit with him or to marry him (*Walker v. State*, 85 Ala. 7, 7 Am. St. Rep. 17; *People v. Kemmler*, 119 N. Y. 580), or because the deceased had interposed obstacles to the marriage of the defendant with some woman. *State v. Lentz*, 45 Minn. 177.

It may be shown that the deceased had supplanted the defendant in the affections of a lewd woman. *Brown v. Com. (Ky.)*, 17 S. W. 220.

In *Renfro v. State (Tex.)*, 56 S. W. 1013, the motive was shown to be that the defendant had been rejected by the daughter of the deceased, to whom he had then imputed unchastity; that defendant had been sued for slander, in which suit deceased was a witness; and that defendant had threatened to kill the deceased for prosecuting the suit.

*Dispute over Will.*

Where the defendant is charged with the murder of his brother, it may be shown that their father's will gave all his property to the deceased and that the defendant had contested the will. *State v. Ingram*, 23 Ore. 434.

*Race Antipathies.*

Where the defendant is charged with killing a Mexican, he may be shown to have attended a meeting the object of which was to rid the neighborhood of cheap Mexican labor. *Chalk v. State*, 35 Tex. Cr. Rep. 116.

*Membership in Criminal Organization.*

To show that the defendants committed the murder as agents of the "Mollie Maguires," the State may show that such an organization existed with its criminal purposes and practices. *Carroll v. Com.*, 84 Pa. St. 107; *Hester v. Com.*, 85 Pa. St. 139; *McManus v. Com.*, 91 Pa. St. 57.

*Improper Relations with the Wife of the Deceased.*

That illicit sexual intercourse may be a motive for homicide, and may be proved in evidence, see *Com. v. Ferrigan*, 44 Pa. St. 386, where it is said: "He is a poor judge of human motives and impulses who cannot see in such a relation as is proposed to be proved here between the deceased's wife and the prisoner, that it might lead to the perpetration of the crime charged, or who would deny that it would probably shed light on the motive."

Defendant, charged with homicide, may be shown to have had improper relations with the wife of the deceased (*Johnson v. State*, 24 Fla. 162; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322; *Templeton v. People*, 27 Mich. 501; *Turner v. Com.*, 86 Pa. St. 54; *Com. v. Fry*, 198 Pa. St. 379; *Onidas v. State*, 78 Miss. 622; *State v. Chase*, 68 Vt. 405; *Weaver v. State (Tex.)*, 65 S. W. 534), after the murder as well as before it. *Miller v. State*, 68 Miss. 221; *Traverse v. State*, 61 Wis. 144.

To show motive for murder the State may prove that the defendant and the wife of the deceased occupied the same room for two nights shortly after the murder. *State v. Abbotts*, 64 N. J. L. 658.

In *Nicholas v. Com.*, 91 Va. 741, the defendant was shown to have been criminally intimate with the wife of the man he was alleged to have drowned, both before and after the latter's death.

The defendant may be shown to have married the wife of the deceased after the homicide, even though such marriage was bigamous. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524.

The defendant may be shown to have been criminally intimate with the deceased's wife to show motive and the degree of the crime. *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

To show defendant's relation with the wife of deceased the wife's letters are admissible to show her affection for defendant and her lack of affection for her husband. *Stokes v. State (Ark.)*, 71 S. W. 248.

*Wife Murder — Various Motives.*

Where the charge is wife murder, the defendant may be shown to have previously beaten and abused his wife. *Phillips v. State*, 62 Ark. 119; *Hall v. State*, 31 Tex. Cr. Rep. 565; *Stone v. State*,

23 Tenn. 27; Thiede *v.* People, 159 U. S. 510; State *v.* O'Neil, 51 Kan. 651, 24 L. R. A. 555.

In Com. *v.* Holmes, 157 Mass. 233, 34 Am. St. Rep. 270, where the defendant was charged with wife murder, evidence was admitted to show that he had beaten and threatened her during almost their whole married life.

The defendant charged with the murder of his wife may be shown to have been married before, and that the former wife was living and not divorced. People *v.* Harris, 136 N. Y. 423.

Where the defendant is charged with wife murder it may be shown that she had made a will leaving her property to the defendant. People *v.* Buchanan, 145 N. Y. 1.

The State may show that the deceased had applied for a divorce from the defendant, but it is not proper to read the divorce petition to the jury. Pinckord *v.* State, 13 Tex. App. 468.

Where it is alleged the defendant killed his wife because she refused to live with him, his motive for desiring her to live with him may be shown to be the fact that she had money and he had none. Sayres *v.* Com., 88 Pa. St. 291.

The defendant charged with wife murder may be shown to have been disappointed in the will of his wife's father. Hendrickson *v.* People, 10 N. Y. 13, 61 Am. Dec. 721.

The wife may be shown to have refused to live with her husband because of violence or for other reasons. State *v.* Bradley, 67 Vt. 465.

It may be shown that the wife had previously had her husband arrested for assaults or for non-support. People *v.* Otto, 4 N. Y. Cr. Rep. 149, 5 N. E. 788; McCann *v.* People, 3 Parker Cr. Rep. (N. Y.) 272.

#### *Concealment of Marriage.*

To show a motive for the defendant's killing his wife, the State may show that he had previously procured abortions on her for keeping the marriage a secret. People *v.* Harris, 136 N. Y. 423.

In O'Brien *v.* Com., 89 Ky. 354, where the supposed motive for the murder of a wife to whom the prisoner had been secretly married was the fact that the announcement of such marriage, which could be delayed but a short time longer, would interrupt his relations with a prostitute and prevent marriage with another woman living in Indiana, to whom he was then under engagement

of marriage, letters of the prisoner to the deceased and such other women were held competent. "All of them . . . showed the existence of a relation between the accused and these two women which might be broken off or interfered with by his marriage to the deceased becoming public. They exhibited a motive why he should desire to rid himself of his wife and their unborn offspring."

*Desire for Another Woman.*

It may be shown that the defendant desired to marry another woman and had said so (*Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *O'Brien v. Com.*, 89 Ky. 354), or that he loved another woman and no longer cared for his wife. *Duncan v. State*, 99 Ala. 31; *Pettit v. State*, 135 Ind. 393; *People v. Wilson*, 109 N. Y. 345.

Where the defendant was charged with wrecking a train upon which his wife was travelling, his proposals to another woman were allowed to be proved. *Shaw v. State*, 102 Ga. 660.

Infatuation with another woman may be shown as a motive for wife murder. *Caddell v. State* (Ala.), 30 So. 76.

*Adulterous Relations with Other Women.*

Adulterous relations of a husband charged with the murder of his wife may be proved. "Love extinguished by adultery gives way to hatred, and a desire to be free from the burden of a wife who is no longer the object of regard." *State v. Watkins*, 9 Conn. 47; so also *Hinshaw v. State*, 147 Ind. 334; *St. Louis v. State*, 8 Neb. 405; *State v. Duestrow*, 137 Mo. 44; *Templeton v. People*, 27 Mich. 502; *People v. Harris*, 136 N. Y. 423; *Johnson v. State*, 94 Ala. 35.

The defendant charged with poisoning his wife may be shown to have been improperly intimate with another woman prior to his wife's death and on the day of her burial. *State v. Hinkle*, 6 Iowa, 380.

Defendant's motive for procuring another to murder his wife was shown that he was in love with another woman with whom he had had intercourse, and that he and his wife had frequent altercations over the other woman. *Givens v. State*, 103 Tenn. 648.

And so where a wife is charged with being accessory to the murder of her husband, her letters may be introduced to show her improper relations with the man who did the killing (*Stricklin v. Com.*, 83 Ky. 566); or where she is herself charged with the mur-

der, her improper relations with a man not her husband may be proved. *People v. Nileman*, 8 N. Y. St. Rep. 300; *Mack v. State*, 48 Wis. 271.

*Other Crimes to Show Motive.*

To show that the motive for the murder of a child by her father was his desire to marry a second wife, it may be shown that he killed his wife and another child also. The Court says: "The theory of the prosecution in this case, as developed on the trial, was, that the defendant conceived that the lives of Emma Hawes, his wife, and of their children, May and Irene, stood between him and the consummation of a second marriage; and hence that the motive which prompted the murder of each of them was the same. There was evidence tending strongly to support this theory, and to show that the death of each of the victims was but a part of a system in which the lives of all were involved, and in the working out of which to the accomplishment of defendant's ulterior purpose, the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife, or of his daughter Irene, was relevant to the issues involved on his trial for the murder of May, and was properly admitted." *Hawes v. State*, 88 Ala. 37, 67.

Proof of a motive is admissible, though it makes necessary the proving of other crimes. *Terr. v. McGinnis* (New Mex.), 61 Pac. 208.

But it is not proper to prove that the defendant committed the crime in question by evidence that he had a different motive to commit another crime.

In *Shaffner v. Com.*, 72 Pa. St. 60, the Court says: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other."

To show that the defendant poisoned a certain horse he may be shown to have poisoned others in pursuance to a scheme to induce people to employ him as a veterinary. *Brown v. State*, 26 Ohio St. 176.

The defendant, on trial for poisoning his wife, may be shown to

have first poisoned his mother-in-law, from whom the wife would inherit property. *Goersen v. Com.*, 99 Pa. 388, 106 Pa. St. 477, 51 Am. Rep. 534.

*Concealment of Another Crime.*

The State may show that the defendant had committed another murder and knew he was suspected of it by the deceased, and this, even if there is proof of other motives. *Moore v. U. S.*, 150 U. S. 57; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

A murder may be shown to have been committed to conceal stolen goods obtained by burglary. *McConkey v. Com.*, 101 Pa. 416.

The defendant may be shown to have known that the deceased suspected him of stealing wood and was watching him. *State v. Fontenot*, 48 La. Ann. 305.

It may be shown that the deceased caught the defendant, charged with murder, in the act of committing burglary and arson. *Blackwell v. State*, 29 Tex. App. 194.

It may be shown that the defendant had employed his slave, with whose murder he was charged, to murder the wife of the defendant. *State v. Posey*, 4 Strob. (S. C.) 142.

Circumstances indicating a rape may be proved to show a motive for murder. *Robinson v. State*, 114 Ga. 56.

Evidence received to show that defendant had been guilty of robbery, to show motive for killing the deceased. *Terr. v. McGinnis* (New Mex.), 61 Pac. 208; *State v. Morgan* (Utah), 61 Pac. 527.

*Concealment of Illicit Intercourse.*

It is competent to show the pregnancy of the deceased by the defendant. *Sage v. State*, 127 Ind. 15; *State v. Klein*, 54 Iowa, 183.

Improper sexual relations between the defendant and the deceased are admissible in evidence. *People v. Buchanan*, 145 N. Y. 1; *Jackson v. Com.*, 100 Ky. 239; *Simons v. People*, 150 Ill. 66.

*Crime to Escape Arrest.*

It may be shown that the defendant had committed a previous felony and killed the deceased (an officer) to escape arrest. *People v. Pool*, 27 Cal. 572.

Where the defendant, a slave, was charged with the murder of another slave, it was shown that the defendant was a runaway and was concealed in a place known to the deceased; that the latter was suspected by the defendant of an intention to disclose the hiding-place, and was threatened with death by the defendant. *Jim v. State*, 24 Tenn. 145.

Defendant's motive for killing an officer may be shown to have been fear of arrest because of an indictment in another State. *Williams v. Com.*, 85 Va. 607.

The State may show that a robbery had been committed, and that the defendants had been arrested for it, to show their motive for killing the officer in charge of them. *Miller v. State* (Ala.), 30 So. 379.

Murder of a peace officer; it was shown that the motive to resist was the fact that the defendant had committed a robbery for which he was about to be arrested. *State v. Morgan*, 22 Utah, 162.

In the case of *People v. Rogers*, 71 Cal. 565, the defendant was convicted of a murder while committing a burglary in the house of the deceased. As a part of the evidence it was allowed to be shown that the defendant had committed two prior burglaries, at one of which he had stolen the knife and chisel with which he gained entrance to the house of the deceased, and at the other of which he stole the pistol with which he committed the murder.

There was such a direct connection among these various crimes that they served to identify the prisoner as guilty of the crime charged.

See also *People v. Molineux*, 168 N. Y. 264, and extended note after Chapter VII, Poisoning Cases.

### *The Case of the Chicago Anarchists.*

A case in which very interesting and very beneficial use was made of circumstantial evidence was the Anarchists' Case, reported as *Spies et al v. People*, 122 Ill. 1.

In the Chicago Criminal Court, eight anarchists were found guilty of murder, seven of them being condemned to death. The seven were August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis

Lingg. The other, condemned to fifteen years' imprisonment, was Oscar W. Neeffe.

On May 1st, 1886, many workmen in Chicago struck to obtain a reduction of their working day to eight hours. There was great excitement, and many meetings and speeches.

On the 4th of May, such a meeting was held at the Haymarket on Randolph St., in Chicago. This meeting was addressed by several of the defendants, and during the address of Spies a charge was made on the crowd by 180 policemen. Bombs were thrown and guns fired at the policemen, and six policemen were killed and six wounded. The defendants were tried for the murder of one of these policemen, Michael J. Degan.

The *corpus delicti* was established by undisputed evidence. Degan was killed by a bomb; of that there was no doubt. It seemed equally well established that not one of the defendants threw the bomb, but they were charged as accessories.

It was shown that they were all members of several anarchistic societies, particularly one known as the International Arbeiter Association, often called the "Internationals" and the "I. A. A." This association was divided into groups, of which there were about eighty in the United States. Certain members of each group were armed and drilled regularly. The most proficient of these armed groups, including the defendants, were also members of a more exclusive organization known as the "Lehr und Wehr Verein." Each member had a Springfield rifle and other weapons, and each was known by number only.

The object of these societies was the destruction of organized society and the right of private property. The members openly and secretly advocated the destruction of property, the murder of officers of the law and of property owners, and the general use of deadly weapons, dynamite, bombs, and other explosives.

The group of defendants published three incendiary newspapers, — *The Arbeiter Zeitung* in German, published by Spies, Schwab, Fischer, and Neebe; *The Alarm* in English, published by Parsons and Fielden; and a still more inflammable sheet called *The Anarchist*, published by Engel. These papers published the signals by which the anarchists were called together at various times, the signal for the meeting of May 4th being "Ruhe." They constantly advocated social revolution and war upon the

police and the militia. Their articles, written by the defendants, contained hundreds of expressions like the following: "Daggers and revolvers are easily to be gotten, hand-grenades are cheaply to be produced; explosives too can be obtained." "Workingmen, arm yourselves." "We wonder whether the workingmen will at last supply themselves with weapons, dynamite, and prussic acid." "If we do not bestir ourselves for a bloody revolution we cannot leave anything to our children but poverty and slavery." "One man armed with a dynamite bomb is equal to one regiment of militia." "Dynamite is the emancipator." "Assassination will remove the evil from the face of the earth."

Articles were published on "How to use dynamite properly," "Manufacturing Bombs," "Exercise in Arms," and extracts were published from the book of Herr Most giving detailed instructions in the manufacture and use of bombs and other weapons.

In many public speeches the defendants had advocated the killing of the police and the militia, using the same arguments and the same language as in their written editorials.

The date for beginning the "social revolution" was May 1st, 1886, for the reason that various labor unions were to strike at that time for the eight-hour day. These defendants did not approve of the eight-hour agitation, except as a means that they could use to bring about total destruction of society. They expected the discontent and want accompanying the strike to drive many workmen to the ranks of the Internationals. The defendants urged all to procure arms for the successful resistance of the authorities during the continuance of the strike. They even made arrangements to purchase guns in large quantities.

In the meantime they had all been experimenting in the manufacture and explosion of bombs. Particularly the defendant Lingg had been so employed.

It became material to show that the bomb with which Policeman Degan was killed had been manufactured by Lingg. To this end it was proved first that the bomb was round. Several witnesses who saw it thrown so described it, and moreover, it was not of the material of which ordinary gas-pipe bombs are made. The manufacture of round bombs requires greater skill and greater secrecy.

Lingg was shown to have manufactured such round bombs in

large numbers. It was also shown that a basketful of his bombs had been carried to the Haymarket meeting. In the next place, the bomb was exploded by means of a fuse. The bombs that Lingg had constructed were all made of two semi-globular shells fastened together, filled with dynamite, and fired by means of a fuse passed through a hole bored for the purpose and attached to a fulminating cap.

Further, the pieces of the bomb taken from Degan's body were of the same chemical composition as the bombs made by Lingg. They were composed of tin and lead, with traces of antimony, iron, and zinc. There is no commercial substance containing all these ingredients. In Lingg's bombs the tin had been added to the lead to procure sufficient resistance for explosion.

The bomb that exploded had on it a small iron nut, which was extracted from the body of a bystander. This indicated that the two semi-globular halves of the bomb had been fastened together with a bolt. Practically all of the bombs made by Lingg, and later discovered, were made of the two semi-globular halves, bolted together, and this nut taken from the body of the bystander exactly fitted those bolts. Lingg himself had been seen making such bombs, with a handkerchief over his face to prevent the inhalation of gas. He had bought dynamite. A poisonous gas exhales from dynamite. The conclusion follows that he put dynamite in the bombs that he was seen to make.

In Lingg's room, after the murder, were found various articles, among them the following: a cold-chisel, a file, shells, loaded cartridges, sheets of lead, bolts, two empty gas-pipe bombs and two loaded with dynamite, a rifle, a round bomb loaded with dynamite, a piece of block tin, a piece of candlestick composed of tin, lead, antimony, and zinc, fuse of various lengths, and fulminating caps. He had every ingredient necessary for the making of bombs like the one that killed Degan.

Differences in the exact amounts of these ingredients in the different bombs would be accounted for by the fact that he made each semi-globe separately with a small ladle over the kitchen stove, casting each in a small clay mould made by himself.

Lingg's purpose in making the bombs is to be found from the purposes for which the International Arbeiter Association existed.

These have been before stated, and were made apparent from the publications and speeches of the other defendants.

There was evidence of a distinct plan on the part of the defendants to attack the police of the whole city on the night in question. Members of the Association helped themselves to bombs brought by Lingg to the rendezvous, and were to make separate attacks upon the police stations, gradually concentrating to fight in the centre of the city. This plan had to be changed because the police were concentrated near the neighborhood of the Haymarket.

There was a vast array of evidence of the foregoing sorts, and the defendants were convicted under a statute of Illinois making accessories punishable as principals. The Court found that Degan's death was directly brought about by the conspiracies and plans of the defendants and other "Internationals." The bombs were made and obtained in pursuance of the plan. The meeting was called at the Haymarket on the appointed evening. That day the signal "Ruhe" was printed, to begin the revolution. In pursuance of the plan, and varying from it only as was made necessary by the location of the police, a bomb was first hurled at them and then the "Internationals" opened fire with guns. The jury were justified in believing that the bomb was thrown either by a member of the conspiracy or by an agent employed to throw it.

This case aroused the greatest of interest and excitement. The accused were found guilty and executed, as already stated.

*Declarations and Acts Indicative of Guilty Consciousness or Intention.*

After the doing of an act has been proved, to show that a certain person did it, a prior declaration of his intention to do it may be proved. *Dodge v. Bache*, 57 Pa. St. 421.

*Premeditation, Intent, and Malice.*

Malice, deliberation, or premeditation must in nearly all cases be shown by circumstantial evidence. The number of circumstances necessary to show this will of course vary. "One case may be proved by a long train of circumstances and events, another by a few sharp and startling facts, and in still another the jury may find in the very act of killing, in the manner in which it

was done, the weapon used, the number of blows and wounds, the time and place where effected, the disposition of the victim, and the objects accomplished, everything requisite to satisfy them of the presence of deliberation and premeditation as components of the crime." *People v. Walworth*, 4 N. Y. Crim. 355.

The nature of the weapon, the number of blows given, and previous conduct are relevant to prove malice and deliberation. *State v. Greenleaf*, 71 N. H. 606 ; *Com. v. Kilpatrick*, 204 Pa. St. 218 ; *Thomas v. State* (Tex.), 72 S. W. 178.

The number and position of the wounds on the body of the deceased may be shown to prove the deadly intent with which the defendant fired. *People v. Walters*, 98 Cal. 138.

*Declarations of Accused to Prove his Intent or Malice.*

Declarations of one accused of murder made before the crime are admissible to prove intent. *State v. Ridgely*, 2 Har. & McH. 120.

The testimony of a witness who overheard the defendant say he was going to kill the deceased and ask for some shells is admissible. *Davis v. State*, 126 Ala. 44.

*Proof of Intent — Declarations.*

In the case of *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, which was a suit on an insurance policy, the defence of the company was that the insured, Jno. W. Hillmon, was still alive, but that he had killed one Walters, and the body of the latter had been buried as that of Hillmon. To prove that this body was not that of Hillmon, the following evidence was held admissible ; that Walters disappeared at about that time and was not heard from afterwards ; that it had been his intention to go on a trip with Hillmon at that time, as was evidenced by his letters to his sister and to his betrothed, and that the body buried was similar to that of Walters. The letters expressing his intention to go with Hillmon on the very trip where Hillmon was claimed to have been killed was held admissible.

Declarations showing malice towards the victim are admissible (*Mead v. Husted*, 49 Conn. 337 ; *State v. Hoyt*, 46 Conn. 330 ; *Com. v. Goodwin*, 14 Gray (Mass.), 55 ; *Com. v. Holmes*, 157 Mass. 233) ; and so is a declaration of intention to do the act. *Mills v. Sword Lumber Co.*, 63 Conn. 108.

But a declaration that one will not do a certain act is not admissible to show that he did not do it. *Fowler v. Madison*, 55 N. H. 171.

*Purpose on Leaving Home.*

When an act is part of the *res gesta*, statements explanatory thereof and concomitant therewith are admissible. Oral and written statements made on leaving home as to purpose and place of going admitted. *Hunter v. State*, 40 N. J. L. 495.

*State of Mind in Homicide.*

The State may show that the accused was armed and vindictive shortly before the homicide. *Kernan v. State*, 65 Md. 253.

The existence of lawsuits between parties is admissible to show their state of feeling. *State v. Zellers*, 7 N. J. L. 220.

A letter written a month before the homicide admitted to show the state of defendant's mind toward the deceased. *Com. v. Krause*, 193 Pa. St. 306.

Evidence of prisoner's being armed and in a vicious humor just before the offence is admissible, even though it incidentally discloses another crime. *Kernan v. State*, 65 Md. 253.

*Allusions to a Contemplated Act.*

Where defendant was charged with the murder of his father, obscure allusions made by him to some coming event were admitted. "The fact that the language might possibly have an innocent meaning did not prevent its consideration by the jury, who would of course be called upon to decide whether such was the fact, or whether it was a dark hint thrown from a mind that already felt the shadow of the coming tragedy." *State v. Hoyt*, 47 Conn. 518.

Defendant was accused of having committed a crime for hire. His statement that he was soon to receive some money was admitted. *State v. Green*, 92 N. C. 779.

In *State v. Hayward*, 62 Minn. 474, it was shown that several months before the crime in question the accused had consulted with a hack-driver about letting his team run away with a certain individual over a bluff into a lake, and had asked him how much he would take for the horses and hack. This was admissible to show that the accused contemplated murder.

*Possession of Knowledge which only the Criminal Could Have.*

Where one is charged with a burglary and homicide, he may be shown to have had a guilty knowledge of the location of objects in the house entered. *State v. Miller*, 100 Mo. 606.

Defendant, charged with the murder of his wife, was shown to have married again within three weeks after her disappearance, and to have said that she would never come back because she was dead. *Wilson v. State*, 43 Tex. 472.

*Conduct Indicating Guilty Knowledge.*

Where the defendant was charged with strangling a woman, on September 17th, it was admitted in evidence that on September 22d the defendant remarked after a row had occurred in a grocery, that he could easily rid the grocery, and "could kill a man by throwing him on the ground, jamming his knees into him, and knocking the breath out of him, then grasping him by the throat and his breath would never return." The evidence showed that this may have been the manner in which the deceased was killed. *Moore v. State*, 2 Ohio St. 500.

Subsequent conduct showing consciousness of guilt is admissible. *McCabe v. Com.*, 8 Atl. 45.

Where a body was found in a well, it was shown that prior to the discovery the defendant was seen looking into the well; that when another left the house with a lantern the defendant said he knew that other was going to look into the well; and that after the discovery, although others went to the well, the defendant did not. *Com. v. Umilian*, 177 Mass. 582.

"Sometimes a person is detected as the author of a crime by showing an unusual anxiety to discover the perpetrator; at other times the discovery is led to by the person showing too much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery; at other times the inquiry is started by his appearing to know too little. These are generally acts that in themselves show no disposition to do mischief; but it is because they are unnatural, because they tend to the conclusion that they are produced by a mind conscious of its guilt, that they are provable against the accused." *Moore v. State*, 2 Ohio St. 502. In this case defend-

ant's conduct when he was told that the body of the deceased had been found was given in evidence.

In *State v. Miller*, 156 Mo. 76, the defendant was shown to be the murderer by proof of threats and motive and by the guilty conscience he evinced when the search of a certain well was proposed. He asserted that the well had damp in it, and that it would be dangerous to go into it. In the well was found an axe helve with which the murder was done.

*Foreknowledge of Death.*

In a recent case reported in the daily papers, it appears that a man in Chicago was accused of marrying and murdering eight wives in as many years. The means used by him seemed to be poison, yet if so, it defied chemical analysis. But he had married the wives under different names, and his operations were discovered through his action in advertising under a new name for a ninth wife, while his eighth wife was still lingering in sickness and three days before her death. Apparently he was very confident that she would soon be dead, and it would seem that his previous experiences warranted his confidence. Such premature confidence is strong evidence of guilt. In this case the advertisement was answered fortuitously by his still living wife's own sister.

Where the defendant was charged with the murder of her sister by poison in pursuance of a scheme to secure insurance money, one of the strongest circumstances against the defendant was the fact that several times while taking care of her sister she said she knew her sister would never get well and that she had had a terrible dream warning her of her sister's impending death. At the time her sister was seemingly much better, but shortly after she had a sudden sinking spell and died. *Com. v. Robinson*, 146 Mass. 570.

The defendant in a murder case may be shown to have said that he wished the deceased would die and that some day the deceased would be found dead in his fields. *Wade v. State*, 65 Ga. 756.

Where the deceased was a material witness against the defendant in a former trial, it was shown that the latter had said the deceased would never appear at that trial. *Caldwell v. State*, 28 Tex. App. 566.

*Malignant Indifference.*

Where the defendant was charged with the murder of his wife it may be shown that on the day after her death he shed no tears and was indifferent, and that when one remarked to him that it was a sad affair at his house, he replied, "Yes, I had a load of oats stolen." *People v. Greenfield*, 85 N. Y. 75, 39 Am. Rep. 636.

Where the defendant was charged with poisoning his seventeen year old wife during her confinement, it was allowed to be proved that he had threatened to send her home to her father, had called her "a d—d big-footed squaw, had forced her to do dangerous labor out-doors in insufficient clothing, and that when she was dying . . . he commenced talking about his orchard and improving his home, and put on a jovial and frivolous air." *State v. Cole*, 63 Iowa, 695.

*Danger of Giving Demeanor too much Weight.*

"Such indications, however, are by no means conclusive, and must depend greatly upon the mental characteristics of the individual. Innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of great sorrow will manifest the greatest composure and serenity in their grief, and meet it without the shedding of a tear." *Greenfield v. People*, 85 N. Y. 75. In this case the defendant was accused of killing his wife, and it was allowed to be shown that he shed no tears.

*Threats — General Authorities.*

Threats to do the act may be proved. *Caverno v. Jones*, 61 N. H. 623; *State v. Day*, 79 Me. 120; *State v. Bradley*, 64 Vt. 466, 24 Atl. 1053; *Mead v. Husted*, 49 Conn. 337; *State v. Hoyt*, 46 Conn. 330; *State v. Hawley*, 63 Conn. 49; *State v. Kallaher*, 70 Conn. 398; *State v. Fry*, 67 Iowa, 475; *People v. Eaton*, 59 Mich. 559; *Com. v. Holmes*, 157 Mass. 233; *Com. v. Crowe*, 165 Mass. 140; *Com. v. Crossmire*, 156 Pa. 304; *Schoolcraft v. People*, 117 Ill. 271; *State v. Harrod*, 102 Mo. 590; *State v. McKinney*, 31 Kan. 570.

Where the defendant took no part in the act of murder, he may be shown to have been an accessory by his previous acts, declarations, and threats. *State v. Prater*, 52 W. Va. 132.

The defendant charged with assault with intent to kill may be shown to have challenged the prosecuting witness to meet him in a dark alley. *Low v. State* (Tex.), 20 S. W. 366.

The State may show that the defendant had previously made threats against the deceased to prove malice or disposition toward the deceased. *State v. Sullivan*, 51 Iowa, 142; *Babcock v. People*, 13 Colo. 515; *State v. Stockhouse*, 24 Kan. 445; *State v. Agnew*, 10 N. J. L. J. 165; *Stewart v. State*, 1 Ohio St. 66.

### *General Threats.*

Threats may be proved even though they were general in nature and made no specific mention of the deceased, unless it is evident that they had no connection with the crime in question. *Jordan v. State*, 79 Ala. 9; *State v. Windahl*, 95 Iowa, 470; *State v. Hymer*, 15 Nev. 49; *Hopkins v. Com.*, 50 Pa. 9, 88 Am. Dec. 518; *Snodgrass v. Com.*, 89 Va. 679.

The State may show that defendant threatened to kill somebody before night, though he did not mention the deceased. *State v. Vance*, 29 Wash. 435.

The defendant may be shown to have said that he would "kill a man before sundown." *Hodge v. State*, 26 Fla. 11.

Threats are admissible though not made directly against the deceased. *Hopkins v. Com.*, 50 Pa. St. 9.

The defendant may be shown to have said that he was going to get even with somebody, though no name was mentioned. *State v. Harlan*, 130 Mo. 381.

### *Threats against a Class.*

One on trial for killing a policeman may be shown to have said that he would "kill any policeman who tried to arrest him again." *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

### *Threats against Third Persons.*

Generally threats made by the defendant against persons, not in any way involved in the crime with which he is charged, are not generally admissible against him. *State v. Driscoll*, 44 Iowa, 65; *Carr v. State*, 23 Neb. 749; *State v. Barfield*, 29 N. C. 299; *Abernathy v. Com.*, 101 Pa. St. 322.

A threat to shoot another constable than the one making the

arrest is admissible as against one charged with shooting the officer arresting him. *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31 (similar case).

Where there is evidence tending to show that the defendant killed the deceased believing him to be another, threats by the defendant against that other are admissible. *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45.

Threats made by defendant to kill A are not admissible on his trial for the killing of B. *Abernathy v. Com.*, 101 Pa. St. 322.

*Threats against Prosecuting Attorney.*

It is error to admit threats by the accused against the prosecuting attorney made subsequent to the crime unless there is something to show an intent to prevent investigation or a consciousness of guilt. *Gawn v. State*, 7 Circ. Dec. 19, 13 Ohio Circ. Ct. 116.

*Threats to Commit a Different Crime.*

A threat to rob is admissible on a trial for murder. *Com. v. Farrell*, 187 Pa. St. 408.

*Threats with a Different Weapon.*

Where the defendant is charged with murder by poisoning, it is proper to show that he had threatened the deceased with a sling shot. *Le Bean v. People*, 34 N. Y. 223.

*Exhibition of a Weapon.*

A threat is more significant if a deadly weapon is exhibited at the time. *Benedict v. State*, 14 Wis. 459.

The previous possession of a gun with threats to kill the deceased may be proved. *People v. Fitzgerald*, 138 Cal. 39.

*Uncommunicated Threats.*

Uncommunicated threats are admissible to show motive and intention. *Com. v. Keller*, 191 Pa. St. 122.

Threats and the purchase of ammunition by the deceased are not admissible on behalf of the accused when he did not know of either. *Turpin v. State*, 53 Md. 462. And see Notes to Chapter 5.

*Time of Making Threats.*

Where thirteen years before the crime the accused had said "he would like to put a ball through his father's heart, but the heart was so much harder than the ball that he thought it would not penetrate it," a jury may well give very little weight to such language because of its remoteness. *Goodwin v. State*, 96 Ind. 550.

Threats of the defendant against the deceased may be proved, even though they were made weeks or even months before the crime, in case any connection whatever can be made between the threats and the act. The lapse of time affects only their weight as evidence. *Karr v. State*, 106 Ala. 1; *White v. Terr.*, 3 Wash. T. 397; *Tuttle v. Com.* (Ky.), 33 S. W. 823.

Threats may be given in evidence irrespective of the length of time since elapsed. "If a long period intervened, during which there were opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat, it would be but a slight circumstance in connecting the accused with the injury, and there would be more reason for regarding it as having been a mere careless, thoughtless utterance or idle bravado, or ebullition of temporary passion. The length of time would impair its probative force, but would not render it inadmissible." *Redd v. State*, 68 Ala. 492.

Threats made four or five years back held too remote. *McMasters v. State* (Miss.), 33 So. 2.

*Previous Quarrels and Ill-Feeling.*

A previous difficulty between the defendant and the deceased is admissible to show motive and malice. *Finch v. State*, 81 Ala. 41; *White v. State*, 30 Tex. App. 652; *State v. Ackles*, 8 Wash. 462; *Brown v. State*, 51 Ga. 502; *Rone v. Com.*, 70 S. W. 1042.

But some connection between that difficulty and the homicide must be shown. *Flint v. Com.*, 5 Ky. Law. Rep. 51; *Pound v. State*, 43 Ga. 88; *Hudson v. Com.*, 69 S. W. 1079.

Previous ill-feeling and malice toward the deceased may be proved. *State v. Cole*, 63 Iowa, 695; *Holmes v. State*, 100 Ala. 80; *State v. De Angelo*, 9 La. Ann. 46; *Aycock v. State*, 2 Tex. App. 381.

Dissatisfaction with a previous settlement for wages may be proved. *Hudson v. State* (Tex.), 70 S. W. 764.

The State may show that the deceased had shortly before challenged the vote of the defendant. *Thompson v. State*, 55 Ga. 47.

A disputed account between defendant and deceased admitted to prove ill-feeling. *State v. Gooch*, 94 N. C. 987.

It may be shown that at a previous trial where defendant was a witness, the deceased gave evidence to impeach defendant's testimony and the latter was very angry. *Rea v. State*, 76 Tenn. 356.

#### *Feuds.*

Where the defendant and the deceased were aligned with two parties who were involved in a continuous feud, previous fights of other members of the two parties may be proved. *McGinnis v. State*, 31 Ga. 236.

The origin of a continuous feud between the parties may be shown. *Coxwell v. State*, 66 Ga. 309.

#### *Remote Quarrels.*

Evidence of remote quarrels is not admissible unless they are connected with the homicide. *Horton v. State*, 110 Ga. 739; *Woodward v. State* (Tex.), 58 S. W. 135.

Evidence of a previous difficulty is admissible, even though it be a remote one. *People v. Brown*, 76 Cal. 573.

#### *Details of the Previous Quarrels.*

The circumstances and merits of the previous difficulty are not admissible (*Tarver v. State*, 43 Ala. 354; *McAnally v. State*, 74 Ala. 9; *Stewart v. State*, 78 Ala. 436; *People v. Thomson*, 92 Cal. 506); but such details may be admissible to prove threats and ill-feeling. *State v. Anderson*, 45 La. Ann. 651.

The defendant need not be given an opportunity to cross-examine as to the details and circumstances of a previous difficulty between him and the deceased. *Com. v. Silk*, 111 Mass. 431.

#### *Wife Murder.*

Previous bad feeling between the defendant and his wife may be proved. *Shaw v. State*, 60 Ga. 246; *Painter v. People*, 147 Ill. 444.

Where defendant is charged with the murder of his wife, it may

be shown that within two months there had been bruises on her body made by him. *Phillips v. State*, 62 Ark. 119.

Threats of defendant to shoot his wife and their previous domestic infelicity may be proved. *People v. Simpson*, 48 Mich. 474.

A previous aggravated assault upon the wife may be proved. *Powell v. State* (Tex.), 70 S. W. 218.

Defendant may be shown to have mistreated his wife for five years preceding the crime. *Spears v. State* (Tex.), 56 S. W. 347.

But defendant's ill-treatment of his wife ten years previously should not be admitted. *Raines v. State* (Miss.), 33 So. 19.

*Proof of Similar Acts or Words in General.*

"When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Stephen Dig. Evid. Art. 11.

"In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely; so, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable. So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, in the case of embezzlement, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased." *State v. Lapage*, 57 N. H. 245, 294.

Other crimes may be relevant if they show the same general purpose. *Brown v. Com.*, 76 Pa. St. 319; *Kramer v. Com.*, 87 Pa. St. 299; *Goersen v. Com.*, 99 Pa. St. 388.

*Res Inter Alios.*

As to the meaning of the maxim, "*Res inter alios acta alteri nocere debet*," Stephen says in his Appendix, Note VI: "You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

"The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show that he is a bad man, and so likely to commit a crime."

*Other Crimes — In General when not Admissible.*

Proof of other crimes is not generally admissible. *Lamb v. State*, 66 Md. 285.

Other offences of a like nature are not provable merely to show that defendant would be *likely* to commit the crime in question. *Clark v. State*, 47 N. J. L. 556; *Ryan v. State*, 60 N. J. L. 552; *State v. Sprague*, 64 N. J. L. 419; *Bullock v. State*, 65 N. J. L. 557.

"The question is, whether A committed a crime. The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is deemed to be irrelevant." Stephen, Dig. Evid. Art. 10. See *Dodge v. Haskell*, 69 Me. 429; *State v. Renton*, 15 N. H. 169, 174; *State v. Wentworth*, 37 N. H. 197, 209; *Reed v. Spaulding*, 42 N. H. 114-124; *State v. Lapage*, 57 N. H. 245; *State v. Hopkins*, 50 Vt. 316; *State v. Kelly*, 65 Vt. 531, 27 Atl. 203, 36 Am. Rep. 884. The fact that the accused has committed similar frauds or crimes is incompetent. *Jordan v. Osgood*, 109 Mass. 457; *Costelo v. Crowell*, 139 Mass. 588; *Com. v. Call*, 21 Pick. (Mass.) 522; *Com. v. Wilson*, 2 Cush. (Mass.) 590; *Com. v. Campbell*, 7 Allen (Mass.), 541, 83 Am. Dec. 705; *Jordan v. Osgood*, 109 Mass. 457; *Com. v. Jackson*, 132 Mass. 16, 19, 44 Am. Rep. 299, note; *Miller v. Curtis*, 158 Mass. 129; *Janzen v. People*, 159 Ill. 440; *Boyd v. U. S.*, 142 U. S. 450; *Shaffner v. Com.*, 72 Pa. 60.

Other crimes not admissible. *Barton v. State*, 18 Ohio, 221 (other thefts); *Coble v. State*, 31 Ohio St. 100 (other assaults); *Farrer v. State*, 2 Ohio St. 54 (other poisonings, the victims being of the same family); *Snurr v. State*, 4 Ohio Circ. Ct. 393 (other acts of rape); *Knight v. State*, 54 Ohio St. 365 (other acts of bribery); *Rose v. State*, 7 Circ. Dec. 226, 13 Ohio Circ. Ct. 342, 56 Ohio St. 779 (seduction before murder).

In an action for assault, similar assaults cannot be proved. *Mathews v. Terry*, 10 Conn. 459.

Other crimes cannot be shown on cross-examination. *Hamilton v. State*, 34 Ohio St. 82.

#### *Other Crimes — When Admissible.*

Proof of other crimes admissible to show motive and intent. *Goersen v. Com.*, 99 Pa. St. 388, 106 Pa. St. 477 (arsenical poisoning); *McConkey v. Com.*, 101 Pa. St. 416; *Kramer v. Com.*, 81 Pa. St. 299; *Com. v. Shepherd*, 2 Pa. St. Dist. 345.

If the evidence is admissible on other grounds, its competency is not affected by the fact that it proves other crimes. *Brown v. State*, 26 Ohio St. 176.

The commission of a burglary by the defendant is admissible to explain why an officer was in a certain house where he was killed by defendant. *Com. v. Major*, 198 Pa. St. 290.

The State may prove the circumstances of making the arrest, including the fact that the defendant killed one of the officers. *Com. v. Biddle*, 200 Pa. St. 647.

#### *Receiving Stolen Goods — Other Instances.*

"Where proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, the fact that there was found in the possession of such person other property stolen within the preceding period of twelve months, is deemed to be relevant to the question whether he knew the property to be stolen which forms the subject of the proceedings taken against him." *Stephen's Dig. Evid.* Art 11.

Other instances of receiving stolen goods are provable. *Com. v. Charles*, 21 Pittsb. Leg. J. 11, 14 Phila. 663; *Com. v. Moorby*,

8 Phila. 615; Com. v. Johnson, 133 Pa. St. 293; Kilrow v. Com., 89 Pa. St. 480.

To prove guilty knowledge on the part of receiver of stolen goods, it may be proved that he had before received stolen goods from the same person. State v. Ward, 49 Conn. 440; Com. v. Johnson, 133 Pa. St. 293; Shriedley v. State, 23 Ohio St. 130.

It is not necessary that the goods before received should have been stolen from the same person, nor be of the same character. State v. Ward, 49 Conn. 441, 442.

A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C. The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C. R. v. Dunn (1826), 1 Moo. C. C. 146; Stephen's Dig. Evid. Art. 11.

Possession of other stolen goods purchased from the same thief is evidence of guilty knowledge. People v. Grossman, 168 N. Y. 47; State v. Wood, 49 Conn. 429; People v. Doty, 175 N. Y. 164.

#### *Other Thefts.*

Other thefts to show knowledge of ownership and intent to steal. People v. Machen, 101 Mich. 401; Housh v. People, 24 Colo. 262; Williams v. People, 166 Ill. 132.

#### *Proof of Fraudulent Intent.*

Obtaining property of other persons in the same manner to show fraudulent intent. Com. v. Lubinsky, 182 Mass. 142; State v. Jackson, 112 Mo. 585; State v. Wilson, 72 Minn. 522.

Proof of other similar fraudulent acts is admissible to show intent to cheat and defraud. Bloomer v. State, 48 Md. 521.

In Bottomley v. U. S., 1 Story, 135, 142, to show fraud in the importation of goods, evidence of other importations by the party was admitted. Judge Story says: "But it appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible: first, to establish the fact that there is such a conspiracy and fraud; and, secondly,

to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent, or purpose, or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency, and often occurring not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge." Thereupon follow examples where such evidence is admitted as prosecutions for the utterance of a forged bill or note, for the utterance of counterfeit money, and for receiving stolen goods.

A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

The fact that two days before A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring. *R. v. Francis* (1874), L. R. 2 C. C. R. 128. The case of *R. v. Cooper* (1875), 1 Q. B. D. (C. C. R.) 19, is similar to *R. v. Francis*, and perhaps stronger. *Stephen's Dig. Evid. Art. 11.*

To prove a conspiracy to defraud, it may be shown that goods bought by one were offered for sale by another below cost. *Blum v. State*, 94 Md. 375.

#### *Forgery.*

To prove guilty knowledge, it is permissible to prove that the accused had in his possession about the same time other forged instruments. *Bloomer v. State*, 48 Md. 521; *Bell v. State*, 57 Md. 108; *Bishop v. State*, 55 Md. 138.

Proof of other forgeries and the possession of other forged

paper. *People v. Frank*, 28 Cal. 507; *Boyd v. Boyd*, 164 N. Y. 234; *Com. v. Miller*, 3 Cush. 243; *State v. Prins*, 113 Iowa, 72; *Anson v. People*, 148 Ill. 494.

To prove forgery, practice copies made by the supposed forger are relevant. *Penn. Co. for Insurance v. Railroad Co.*, 153 Pa. 160.

To prove that a note was raised in amount, it is proper to admit a card showing practice work in the alteration of figures. *Wheeler v. Ahlers*, 189 Pa. 138.

### *Perjury.*

On trial for perjury, it is permissible to show that the witness testified to immaterial matters falsely for the purpose of showing intention and to rebut any claim of mistake. *Dodge v. State*, 4 Zab. 456.

### *Counterfeiting.*

"A man might think the money he passed was good, and he might be mistaken once or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit." *People v. Sharp*, 107 N. Y. 467.

A is charged with uttering on the 12th December, 1854, a counterfeit crownpiece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crownpiece on the 11th day of December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crownpiece uttered on the 12th was counterfeit. *R. v. Forster* (1855), *Dear*. 456; and see *R. v. Weeks* (1861), *L. & C.* 18; *Stephen's Dig. Evid. Art.* 11.

Possession of other counterfeit money to prove intent and knowledge in uttering. *State v. Hess*, 5 Ohio, 9; *Com. v. Hall*, 4 Allen, 306.

To prove *scienter* and intent in passing counterfeit money other crimes of the sort are admissible. *State v. Van Houten*, *Pen.* 672; *State v. Robinson*, 1 *Harr.* 507.

Other utterances of counterfeit money. *Stalker v. State*, 9 Conn. 341; *Com. v. Bigelow*, 8 Metc. 235; *Com. v. Jackson*, 132 Mass. 18; *State v. McAllister*, 24 Me. 139; *Griffin v. State*, 14 Ohio St. 55.

*Mutual Disposition in Adultery.*

On trial for adultery, prior acts of adultery between the same parties are admissible to prove their mutual disposition. *State v. Jackson*, 65 N. J. L. 62; *State v. Snover*, 65 N. J. L. 289.

Other acts of adultery and other improper familiarities may be proved to show an adulterous disposition. "When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place." *Thayer v. Thayer*, 101 Mass. 113; *State v. Bridgman*, 49 Vt. 210; *People v. Edwards*, 73 Pac. 416; *Lamphere v. State*, 114 Wis. 193.

A conviction of adultery may be based upon evidence of an adulterous disposition between the parties, and that they were together when they had an opportunity. *Monteith v. State*, 114 Wis. 828; *State v. Brink*, 68 Vt. 659.

And an adulterous disposition was established by evidence of prior and subsequent intercourse. *State v. Moore* (Iowa), 88 N. W. 322; *State v. Snover*, 65 N. J. L. 289; *Crane v. People*, 168 Ill. 395. But see *People v. Fowler*, 104 Mich. 449.

An information for adultery charged a single act of adultery in a single court. *Held*, that, having given evidence of one such act, the State could not proceed to show other instances of the same crime committed with the same person at other times and places. *State v. Bates*, 10 Conn. 373.

*Previous Illegal Sales of Liquors.*

In a prosecution for keeping liquors with intent to sell the same, the State offered evidence of sales made by the defendant before the date of the alleged offence. *Held*, that it was admissible on the question of intent, although other prosecutions for such sales were pending against him. *State v. Raymond*, 24 Conn. 206.

A is charged with illegally keeping liquors for sale. The fact that nearly three months prior to the complaint and seizure in question A had been convicted, on a plea of *nolo contendere*, of illegally keeping liquors, is relevant to show intent. *State v. Plunkett*, 64 Me. 534.

*Abortion.*

To prove intent, where the defendant is charged with procuring an abortion, he may be shown to have operated in the same way on other occasions. *Com. v. Holmes*, 103 Mass. 440; *Com. v. Corkin*, 136 Mass. 429.

In a prosecution for causing abortion, proof as to the character of the house where it occurred is admissible. *Hays v. State*, 40 Md. 633.

Evidence of a subsequent attempt to cause an abortion by different means is admissible to show intent on the first occasion. *Lamb v. State*, 66 Md. 285.

*Conspiracy.*

Proof of a combination or conspiracy for a criminal purpose is not often made by direct, open, and positive evidence, but more generally and more naturally by proving a repetition of acts of a character conducing to show a mutual purpose. In such cases it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination, but when it is seen in connection with other acts, its true nature may be discovered. *State v. Spaulding*, 19 Conn. 237. See also *Stalker v. State*, 9 Conn. 341.

*Arson.*

Other attempts to fire the same building are admissible to negative accident or negligence. *Com. v. McCarthy*, 119 Mass. 355; *Com. v. Bradford*, 126 Mass. 42.

A is accused of setting fire to his house in order to obtain money for which it is insured. The fact that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental. *R. v. Gray* (1866), 4 F. & F. 1102.

"I acted on this case in *R. v. Stanley*, Liverpool Summer Assizes, 1882, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence to show that other fires were accidental." Stephen's Dig. Evid. Art. 12.

To show that defendant was guilty of arson, it was proved that when arrested he referred to the arson before he was charged with it. *Meeks v. State* (Ga.), 30 S. E. 252.

Defendants were shown to be guilty of arson by prior threats and by the fact that they removed their property from the building shortly before the fire. *People v. Smith*, 55 N. Y. Supp. 932, 162 N. Y. 520.

### *Poisoning Cases.*

Where the defendant is charged with murder by poisoning, other attempts to kill or to poison the deceased, and other murders by poisoning, may be proved to show intent and to negative mistake. *State v. Smith*, 102 Iowa, 656; *Zoldoske v. State*, 82 Wis. 580; *People v. Thacker*, 108 Mich. 652; *Com. v. Robinson*, 146 Mass. 571.

The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional. The facts that B, C, and D (A's three sons) had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D. *R. v. Geering* (1849), 18 L. J. M. C. 215; *Stephen's Dig. Evid. Art. 12*.

"If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died." *R. v. Dossett*, 2 C. & K. 307.

Where one is accused of killing another, though not by poison, it may be shown that he purchased poison and took it to the house of the deceased. Such evidence is relevant as showing an intention to murder. *Mobley v. State*, 41 Fla. 621.

### *Actions for Crim. Con.*

In action for crim. con. the defendant may be asked on cross-examination as to intercourse with plaintiff's wife prior to her marriage. *Foulks v. Archer*, 31 N. J. L. 58.

In action for crim. con., after giving evidence of adultery prior to separation subsequent adultery may be proved. *Sherwood v. Titman*, 55 Pa. 77.

*Existence of System to Show Intent or Motive.*

System of selling liquor by seeming to give it away admitted to prove intent. *Archer v. State*, 45 Md. 33.

The defendant, charged with murder, was shown to have pretended to be a medium and to have induced the deceased to wear a belt with gold coins in it to develop power, and that the defendant had worked a similar game on others and secured this gold by dexterous fingers. *People v. Archer* (Mich.), 86 N. W. 140.

Proof of other embezzlement to show system and fraudulent intent. *People v. Hawkins*, 106 Mich. 479; *Com. v. Tuckerman*, 10 Gray, 173.

*Prior Attempts.*

To prove an assault with intent to kill, the intent may be shown by evidence of prior attempts (*State v. Merkley*, 74 Iowa, 695; *Lawrence v. State*, 84 Ala. 424; *State v. Nugent*, 71 Mo. 136), even though the attempt was made in a different manner (*State v. Patza*, 3 La. Ann. 512), and so an attempt to murder may be shown by proof of prior attempts. *State v. Nugent*, 71 Mo. 136; *People v. Jones*, 99 N. Y. 667; *Nicholas v. Com.*, 91 Va. 741.

It is competent for the State to prove previous assaults by the defendant upon the deceased, or previous attempts to take his life, though not by the same means. *Painter v. People*, 147 Ill. 444; *Williams v. State*, 64 Md. 384; *Com. v. Crossmire*, 156 Pa. 304.

On trial of defendant for the murder of an officer, it may be shown that he had already tried to kill another officer who was trying to arrest him, to show intention to kill any officer making such an attempt. *People v. Coughlin*, 13 Utah, 58.

On trial for murder of a wife by setting fire to her dress, it may be shown that defendant at another time set fire to her dress. *Com. v. Birriolo*, 197 Pa. 371.

*Preparations and Opportunity for the Commission of Crime.*

*Preparation.* — Acts of preparation may be proved. *Com. v. Choate*, 105 Mass. 451; *Com. v. Blair*, 126 Mass. 40; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *People v. Hope*, 62 Cal. 291; *Spies v. People*, 122 Ill. 1; *McManus v. Com.*, 91 Pa. 57.

Statements in preparation for an act are admissible with proof of the act. *Hunter v. State*, 40 N. J. L. 538.

A proposition made by defendant to take an unfrequented path is admissible as showing preparation to commit a crime ; it may be shown also that defendant had a pistol. *Garlitz v. State*, 71 Md. 293.

To prove defendant guilty of adultery, it may be shown that he procured another to find out if the woman's husband was at home. *State v. Green*, Kirby (Conn.), 89.

It may be shown that the defendant borrowed a knife just before the act in which that knife was used, to show preparation. *Finch v. State*, 81 Ala. 41.

Where defendant was accused of stabbing another it was shown that he had a knife sharpened prior to the act and had inquired as to the location of the heart. *Walsh v. People*, 88 N. Y. 462.

#### *Possession of Instruments.*

Where the defendant was charged with arson, and it was shown that the fire in question had been started by means of an ingenious and peculiarly constructed fire-box, evidence was admitted to show that the defendant had had in his possession prior thereto a similar box used for a similar purpose, "to show that he possessed the requisite skill, materials, tools, and opportunity" to have made the box in question. *Com. v. Choate*, 105 Mass. 451.

#### *Homicide Cases.*

The defendant may be shown to have armed himself with a knife on the morning of the homicide to show his intent. *Walsh v. People*, 88 N. Y. 458.

Where deceased was killed by a stab in the heart, the defendant may be shown to have had a knife, although no one saw the knife at the time of the homicide. *People v. Rogers*, 18 N. Y. 9.

It may be shown that the defendant borrowed a knife in preparation for expected trouble, when he was charged with killing deceased with a knife. *Finch v. State*, 81 Ala. 41.

The defendant, accused of homicide, may be shown to have purchased a gun and bullets for the purpose of shooting the deceased. *Moon v. State*, 68 Ga. 687 ; *Young v. Com.* (Ky.), 29

S. W. 334 ; State *v.* Doherty, 72 Vt. 381 ; State *v.* Rider, 95 Mo. 474 ; People *v.* Scott, 153 N. Y. 40.

To prove that the defendant was guilty of murder, it may be shown that he purchased a gun and practised shooting before the act was committed. Bolling *v.* State, 54 Ark. 588. People *v.* McGuire, 135 N. Y. 639.

The defendant may be shown to have had a weapon with which certain wounds could have been inflicted. People *v.* McDowell, 64 Cal. 467 ; Merrick *v.* State, 63 Ind. 327 ; State *v.* McKinney, 31 Kan. 570.

That the accused obtained the instruments with which the crime was committed may be proved. Com. *v.* Roach, 108 Mass. 289 ; Com. *v.* Blair, 126 Mass. 40.

To prove the accused guilty of sinking a boat, it may be shown that he had an auger fitting a hole made in the bottom of the boat. Nicholas *v.* Com., 91 Va. 741.

#### *Possession of Poison.*

The defendant, charged with poisoning his wife, may be shown to have obtained arsenic to kill rats, and that when asked where he got it he replied, "It is none of your business." State *v.* Hinkle, 6 Iowa, 380.

Where defendant is charged with mixing arsenic with food, the previous purchase and possession of arsenic may be proved. Com. *v.* Hobbs, 140 Mass. 443. And so where the defendant is charged with murder by strychnine poisoning. State *v.* Cole, 94 N. C. 958.

#### *Burglar's Tools.*

Where defendant was shown to have had possession of goods taken during a burglary, and claimed to have bought them, the State may show that he had burglar's tools in his possession, though it was a month after the crime. Williams *v.* People, 196 Ill. 173.

Possession by the defendant several months before a safe-breaking of percussion caps such as were used in the crime, may be proved. State *v.* Wayne, 62 Kan. 636.

Where chloroform was used in a burglary, it may be shown that the defendant possessed chloroform. Miller *v.* State (Tex.), 50 S. W. 704.

Prior possession of burglar's tools is admissible as a fact to show that the defendant committed a burglary. *State v. Franks*, 64 Iowa, 39; *State v. Wayne*, 62 Kan. 636.

*Instruments to Produce Abortion.*

Where a defendant was accused of procuring an abortion, it was allowed to be shown that he had instruments that could be used for that purpose. *Com. v. Brown*, 121 Mass. 71; *People v. Sessions*, 58 Mich. 594.

*Instruments to Commit Arson.*

Possession of a jug which was used in setting fire to a building with oil is admissible. *Thomas v. State*, 107 Ala. 13.

Where a fire was started with oil put into auger holes, the State may show that there was a brace in the house to show that accused had the means at hand. *People v. Bishop*, 134 Cal. 682.

Where one was accused of arson, it was allowed to be shown that the defendant had in his possession a box with inflammable materials and a candle, and that the fire in question was set with a similar box and candle. *Com. v. Choate*, 105 Mass. 451.

*Instruments Used in Forgery and Counterfeiting.*

To prove alteration of a check, it may be shown that defendant had materials which would remove ink. *People v. Brotherton*, 47 Cal. 402.

Possession of tools used for forging banknotes is admissible. *R. v. Ball*, 1 Camp. 324.

To prove the defendant guilty of counterfeiting, it may be shown that he had instruments adapted to the business. *U. S. v. Burns*, 5 McLean, 23.

*Opportunity.*

There can be no doubt that opportunity to commit a crime, or the mere physical presence of the accused in the neighborhood, is relevant to show that he may be the guilty party. He may of course show that others had equal opportunity. Proof of opportunity would, unsupported, have very little weight.

In *State v. Wentworth*, 37 N. H. 196, where defendants were accused of putting stones upon a railroad track, it was allowed to be shown that they had within two hours, and not far away, placed

ron rails on the track, for the purpose of showing that they had the opportunity of doing the act charged.

One charged with homicide may be shown to have known of a letter received by the deceased, calling him past the place where he was killed; and to prove such knowledge on the part of the defendant, his conversations since the crime are admissible. *State v. Seymour*, 94 Iowa, 699.

It may be shown that the defendant had an opportunity to commit the crime in question, and it need not be shown that the defendant was the only person having such opportunity. *Terr. v. DeGutman* (New Mex.), 42 Pac. 68.

The defendant was shown to have had access at all times to a bakery adjoining premises where a burglary was committed, and it was proved by marks on the window that a screw-driver belonging in the bakery had been used to open a window in a partition between the two rooms. *State v. Marshall* (Iowa), 74 N. W. 763.

Burglary of watches. Defendant was shown to have known where the watches were kept. *State v. Fitzgerald*, 72 Vt. 142.

#### *Presence at the Place of a Crime.*

Mere presence of a person at the scene of a crime is not alone sufficient as a basis for the inference that he assented to its commission. *State v. Maloy*, 44 Iowa, 104.

One may be convicted of a crime upon circumstantial evidence, though there is no proof that he was seen near the place of its commission. *People v. Flynn*, 73 Cal. 511.

The defendant's presence in the vicinity of the crime, his opportunity of knowing when the deceased was to leave a certain place, and the fact that the defendant was not customarily in that vicinity, though not to be given much weight, are admissible links in a chain of circumstantial evidence. *Campbell v. State*, 23 Ala. 44.

Defendant was shown to have been present at the time of the crime, and that the instrument (a broadaxe) with which the murder was committed was in the house prior thereto. *Cicely v. State*, 13 Smedes & M. (Miss.) 203.

#### *Strength and Ability to Commit the Crime.*

The defendant may be shown to have had a peculiar grip whereby he could "shut anybody's wind off," when the marks on the de-

ceased could have been made by such a grip. *Com. v. Crossmire*, 156 Pa. 304.

The relative strength of the parties to a struggle may be shown, but only by evidence of a general character and not by proof of specific acts, particularly acts in themselves likely to prejudice the defendant. *Wellar v. People*, 30 Mich. 16.

The deceased may be shown to have been old and feeble, while the defendant is young and strong. *Davidson v. State*, 135 Ind. 254.

Where one is charged with strangling another, evidence that after the crime he showed how he could kill by strangling is admissible. *Moore v. State*, 2 Ohio St. 500.

Evidence that defendant had a loaded revolver proves that he had the "present ability" to do the act threatened. *State v. Sheerin*, 12 Mont. 539.

The physical strength of the accused is admissible to show that he would have been able to do the act. *Thiede v. Utah*, 11 Utah, 241, 139 U. S. 510; *State v. Cushing*, 17 Wash. 544.

To rebut the claim of self-defence the State may show that the deceased was small and weak and nearly blind. *State v. Goddard*, 162 Mo. 198.

To show that the defendant had capacity and opportunity to put two large stones on a railroad track, it may be shown that he very shortly before put iron rails on the track nearby. *State v. Wentworth*, 37 N. H. 196.

#### *Ability and Skill of the Defendant.*

Where the defendant was charged with election frauds connected with registration lists, it may be shown that the defendant was in conspiracy with others to do the acts charged, and that the defendant, because of his position and control of patronage, was able to influence and to coerce the others involved. *People v. McKane*, 143 N. Y. 455.

One charged to have procured goods on credit with intent to defraud may be shown to have had such credit in the community as to have made it possible for him to obtain the credit in question. *Com. v. Eastman*, 55 Mass. (1 Cush.) 189.

In Webster's trial it was shown that the body of Doctor Parkman had been dissected in a professional manner, and that the defend-

ant was a professor in a medical school, to assist in identifying him as the murderer. *Com. v. Webster*, 5 Cush. 295.

Similar evidence was held admissible in *People v. Durrant*, 116 Cal. 179.

Where the defendant is charged with altering a check, it may be proved that there is a fluid with which writing may be removed, and that the defendant is expert in its use. *People v. Dole*, 127 Cal. 492, 68 Am. St. Rep. 50.

But in *State v. Hopkins*, 50 Vt. 316, where the defendant was accused of forgery, it was held improper to show that he had skill in imitating the signatures of others.

#### *Knowledge of Drugs.*

One charged with procuring an abortion may be shown to have had knowledge of the drugs actually used in the case, and to have advertised that he was able to produce miscarriages. *Weed v. People*, 56 N. Y. 628.

That the defendant made inquiries as to the use of drugs in procuring an abortion is admissible on the question of his having procured one. *Jackson v. Com.*, 100 Ky. 239.

#### *Knowledge of Weapons.*

Where a boy of twelve was accused of shooting another, evidence is admissible to show his knowledge and experience as to firearms. *State v. McDonald*, 14 R. I. 270.

#### *Preparations and Predictions of Death.*

In *Nicholas v. Com.*, 91 Va. 741, where defendant was charged with causing deceased's death by drowning, he had made a prior attempt to poison the deceased, and had predicted the latter's sudden death from heart disease. There were three large holes bored in the bottom of the boat where the defendant sat, and they were the size of an auger possessed by the defendant. He had invited the deceased to accompany him across the river to rob a bee tree, knowing that the deceased could not swim.

On a trial for the murder of X, it was shown that one Y had previously been killed, and the defendant remarked that the one who had killed Y intended to kill X also. *People v. Evans*, 41 Pac. 444 (Cal.).

*Predictions of a Fire.*

Defendant had predicted that all of L's buildings would burn, and proof was admitted that the dwelling had been set on fire to show that defendant had burned the barn. *State v. Hallock* (Vt.), 40 Atl. 51.

A prediction that a third person was about to set fire to certain buildings was admitted to prove that defendant committed arson. *State v. Gailor*, 71 N. C. 88.

*Recent Possession of the Fruits of Crime.*

*Possession to Prove Larceny.* — Possession of stolen goods is admissible as a fact tending to show that the possessor stole them. "The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, — that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong that it almost amounts to proof, because the reasonable inference is that the person must have stolen the property." *R. v. Exall*, 4 F. & F. 922.

Where there has been a larceny of money, it may be shown that the accused had possession of certain specific pieces, if they can be identified, or that after the crime he had plenty of money while before he had none. *Com. v. Mulrey*, 170 Mass. 103; *Boston & W. R. R. Co. v. Dana*, 1 Gray, 101; *State v. Grebe*, 17 Kan. 458; *Gates v. People*, 14 Ill. 433.

The possession of a bottle of brandy admitted as evidence of an intention to steal it. *People v. Griswold*, 64 Mich. 722.

Where the defendant is charged with larceny of a beef, it may be shown that certain bones were dug up on his premises appearing to be the bones of an animal about the size of the one stolen. *Foster v. State*, 56 S. W. (Tex.) 58.

*Possession of a Part Only.*

A conviction may be had without showing that all the property stolen was traced to the possession of the defendant. If it is shown

that he had in his possession even a very small portion of the stolen goods, this, in connection with other evidence, may convict him of having taken all. *State v. Owens*, 79 Mo. 619; *Knickerbocker v. People*, 43 N. Y. 177.

*Other Property Stolen at Same Time.*

Possession of other property stolen at the same time as that alleged in the indictment may be proved. *State v. Wrاند* (Iowa), 78 N. W. 788.

*To Prove Burglary.*

Possession of recently stolen goods as evidence of burglary. *Considine v. U. S.*, 112 Fed. 342; *Boersh v. State* (Tex.), 62 S. W. 1060; *People v. Brady*, 133 Cal. xx, 65 Pac. 823; *State v. Ryan* (Iowa), 85 N. W. 812; *Holland v. State*, 112 Ga. 540; *Cook v. State* (Miss.), 28 So. 833; *Robertson v. State* (Fla.), 24 So. 474; *Jones v. State* (Ga.), 31 S. E. 574; *People v. Sears*, 119 Cal. 267; *State v. Dale*, 141 Mo. 284.

Mere possession of the goods held insufficient to establish that the defendant committed a burglary unless the breaking and entering are also proved. *Lester v. State* (Ga.), 32 S. E. 335. But it may be sufficient to identify the defendant as the one who did break and enter. *Hunter v. Com.* (Ky.), 48 S. W. 1077.

To prove burglary, it was shown that defendant had possession of some of the stolen property three days after the crime. *State v. Armstrong*, 170 Mo. 406.

A joint possession of goods stolen by several defendants may be proved to show that they committed burglary. *Robertson v. State* (Fla.), 24 So. 474.

Possession of a key fitting the lock in the house entered, and defendant's attempt to throw it away, are evidence of the commission of burglary. *Holland v. State*, 112 Ga. 540.

*To Prove Robbery and Murder.*

Possession of money of the same kind and denomination to show robbery. *Musser v. State* (Ind.), 61 N. E. 1.

Where a man was killed to effect robbery, it may be shown that the defendant had money when arrested, even though the money is not identified as having belonged to the deceased. *Chapman v. State* (Tex.), 65 S. W. 1098.

"Possession of the fruits of crime," held to have great weight in proving a murder, where a murder and a robbery were committed at the same time. *Williams v. Com.*, 29 Pa. 102.

*To Prove Murder.*

In the case of *People v. Durrant*, 116 Cal. 179, where the defendant was charged with the murder of a young lady, it was shown that he had attempted to sell to a pawnbroker a certain ring that had been worn by the deceased, and that later this ring and others, likewise belonging to the girl, came by mail to the girl's aunt, wrapped in a paper bearing names written in the defendant's handwriting.

It may be shown that prior to a murder the defendant had been unable to pay a debt of \$16, but the next day paid debts of \$116, in all, and that the deceased had when killed more than \$100. *Schneider v. State*, 2 Ohio Cir. Ct. R. 420.

The fact that the defendant pawned a watch and also disposed of certain clothing, all of which had belonged to the deceased, was admitted to prove the defendant guilty of murder in *Terr. v. Bryson*, 9 Mont. 32.

In *State v. Jackson*, 95 Mo. 623, the defendant was shown to have been out of money and in search of work, while the deceased had money. After the time of the murder the defendant ceased to hunt work and had plenty of money.

To convict the defendant of murder, he was shown to have been in the company of the deceased after the latter had just completed some remunerative work, that later he was alone driving two teams owned by the deceased, one being hitched ahead of the other by means of a rope instead of the usual chain. He also had several hundred dollars in his possession. He told a story of having bought the teams of the deceased and then departed. The body of deceased was found in a river where they had been, with the wagon chain wound about the neck and mortal wounds on the body. The evidence was held sufficient to sustain a conviction. *State v. Foster*, 91 Iowa, 164.

To connect defendant with a murder, it was shown that the deceased had sold cattle prior to the murder, and that after the event the defendant spent much money the possession of which he did not account for. *Lancaster v. State*, 36 Tex. Cr. R. 16.

The defendant may be shown to have had the murdered man's wagon, clothing, pocket-book, and other property, after the crime. *State v. Gartrell*, 171 Mo. 489.

The State may show that certain property of the deceased was found in the trunk of the defendant who was accused of the murder. *Morris v. State*, 30 Tex. App. 95.

Possession of two watches previously carried by the deceased admitted as evidence that defendant was guilty of the homicide. *Lindsay v. People*, 67 Barb. 548, affirmed 63 N. Y. 143.

It may be shown that the defendant had no money prior to the date of a homicide, and that afterwards he had money similar in kind and amount to that in the former possession of the deceased. *Gates v. People*, 14 Ill. 433; *State v. Davis*, 87 N. C. 514 (coins of an early date).

In *Betts v. State*, 66 Ga. 508, it was shown that the deceased had had four \$20 bills and some other paper money, and that the defendant, charged with murder, attempted to conceal such bills and other money.

To prove that the defendant was guilty of homicide, it was shown that the deceased had two gold bars, that the defendant was just out of prison and had no money, and that he sold two gold bars shortly after the event. It was not shown that the gold bars were the same, but the defendant was convicted. *People v. Collins*, 64 Cal. 293.

*Possession May Make a Prima Facie Case.*

Recent possession of the stolen goods, when unexplained, has been held sufficient to warrant a conviction. *Lehman v. State*, 18 Tex. Crim. 174; *Roberts v. State*, 17 Tex. Crim. 82. But in *State v. Reese*, 27 W. Va. 375, unexplained possession was held not to make out a *prima facie* case. The contrary has frequently been held. *Smith v. People*, 103 Ill. 82; *Comfort v. People*, 54 Ill. 404; *State v. Jennings*, 81 Mo. 165; *State v. Kennedy*, 88 Mo. 341.

The bare fact of possession is generally said to be insufficient evidence upon which to convict, but with other circumstances of suspicion it may make out a *prima facie* case. *People v. Antonio*, 27 Cal. 404; *Moreno v. State*, 24 Tex. Crim. 401.

Two men, charged with the murder of an express messenger,

\$21,000 having been stolen from the car, were shown to have had great sums of money after the crime, some \$50 and \$100 bills being identified. Their only explanation was that they had received money from relatives, and they were convicted. *Watt v. People*, 126 Ill. 9, 1 L. R. A. 403.

Possession of a sack of malt within an hour after a burglary, and failure to explain such possession, held sufficient to convict. *People v. Joy* (Cal.), 66 Pac. 964.

It is sufficient evidence to sustain a conviction for larceny that defendant was found skinning another's hog, newly killed, and that when discovered he ran away (*Walker v. State*, 3 Tex. App. 70); or that defendant was discovered with a box of tobacco and ran with it until caught. *Carreker v. State*, 92 Ga. 471.

*Possession Raises a Presumption of Fact.*

The presumption arising from possession of stolen goods is generally held to be one of fact, to be drawn by the jury alone from the circumstances of the case. *Smith v. State*, 58 Ind. 341; *Snowden v. State*, 62 Miss. 100; *Lockhart v. State*, 29 Tex. Crim. 35; *Dillon v. People*, 1 Hun, 670; *State v. Richart*, 57 Iowa, 245; *State v. Hodge*, 50 N. H. 510; *Graves v. State*, 12 Wis. 591. But in *State v. Kelly*, 73 Mo. 608, the presumption is said to be one of law.

*Possession by Another than the Defendant.*

Defendant was accused of burglary, and with C escaped from jail. Later C was found in possession of property stolen at the place of the burglary, at which time he himself was in jail. His possession was admitted as evidence against defendant. *Riding v. State* (Tex.), 50 S. W. 698.

Possession by the defendant's son of the hide of a heifer alleged to have been stolen, and the selling of fresh meat by the defendant, were admitted to show that defendant stole the heifer. *Brown v. State*, 34 Tex. Cr. R. 150, 29 S. W. 772.

*Length of Time Elapsed.*

The fact that the defendant had possession of goods stolen may be proved, notwithstanding the length of time elapsed, that circumstance affecting the weight and not the competency. *Lindsay*

*v. People*, 63 N. Y. 243; *State v. Rights*, 82 N. C. 675; *Mooney v. State*, 24 Tex. Crim. 401.

Where the goods found in the possession of the defendant are of a sort easily transferred from hand to hand, as banknotes, the presumption may be very weak, even though the time be short (*Warren v. State*, 1 Iowa, 106; *Snowden v. State*, 62 Miss. 100; *State v. Castor*, 93 Mo. 242); while if the property be bulky and unusual in nature, as a statue, the presumption would be strong, though the time be long.

When one is found in possession of stolen goods, the presumption to be drawn therefrom is strong or weak in proportion to the length of time elapsed since the crime. *White v. State*, 72 Ala. 195; *Gabbick v. People*, 40 Mich. 292; *State v. Floyd*, 15 Mo. 349; *State v. White*, 89 N. C. 462; *Pollard v. State (Tex.)*, 26 S. W. 70.

#### *False Explanations.*

An improbable or false explanation of the possession of stolen goods strengthens the presumption of guilt; and so, also, if the defendant gives conflicting explanations (*Enbanks v. State*, 82 Ga. 62; *State v. Rodman*, 62 Ga. 456; *State v. En*, 10 Nev. 277; *Towle v. State*, 47 Wis. 545); as when the defendant claims he bought them at auction and there has been no auction. *State v. Donovan (Mo.)*, 26 S. W. 340.

The fact that the defendant made several explanations as to his possession of property is admissible to prove he stole the property. *State v. En*, 10 Nev. 277.

#### *Unexplained Appearances of Suspicion and False Explanations of Them.*

##### *Personal Appearance of Accused.*

The appearance of the accused after a homicide, and that he looked terror-stricken and wild, may be proved (*Cottell v. State*, 5 Circ. Dec. (Ohio) 472, 12 Ohio Circ. Ct. 467); so his embarrassment may be shown. *Moore v. State*, 2 Ohio St. 500.

There were scratches on the person of the defendant, and he accounted for them by saying that he had been put off of a certain train. It was proved that no one had been put off of that train. *State v. Lucey (Mont.)*, 61 Pac. 994.

*Appearance of Clothing.*

It may be shown that defendant's shirt was found wet with sweat, where he is charged with murder, and if guilty, he must have run home three miles. *Baines v. State* (Tex.), 66 S. W. 847.

Where one is accused of setting a fire with kerosene, it may be shown that there were kerosene stains on his shirt. *State v. Kingsbury*, 58 Me. 238.

Where the defendant was charged with murder and robbery, it was shown that some time after the murder he had pawned jewels belonging to the deceased, and told various untrue stories as to how he got them. He shaved his moustache shortly after the murder, and a suit of his clothes was found with blood on them. He was convicted. *People v. Neufeld*, 165 N. Y. 43.

*Suspicious Conduct.*

Where the accused was charged with causing the death of deceased by drowning, it was shown that he refused to assist in the investigation of the drowning until threatened with arrest, and otherwise behaved suspiciously. *Nicholas v. Com.*, 91 Va. 741.

*Recently Fired Gun.*

A shotgun found in the defendant's house showed that one barrel had been recently discharged. When asked where he was when it was fired, he said "in bed." But it was shown that there were no traces whatever of a shot having been fired in his room. *Williams v. State* (Ark.), 16 S. W. 816.

*Failure to Explain Suspicious Circumstances.*

"Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, — though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances, as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with

his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution." *Com. v. Webster*, 5 Cush. 295, 316.

"There is an absence of all effort on the part of the prisoner to explain two circumstances in the early part of the transaction which have some bearing in the case. The first is the failure to show where he was, from the time he crossed the river until he overtook Sandifer and Riddle at sunset. The other is, that he did not show whether he went to Newsom's to supper, as he said he intended to do. These are considerations of great force against him." *McCann v. State*, 13 Smedes & M. (Miss.) 471, 493.

#### *False Explanations.*

Misrepresentation of the facts and concealment were held sufficient to convict the defendant of an attempt to murder with a bomb, where the bomb had exploded and wounded the defendant himself, in *Jambor v. State*, 75 Wis. 664.

Contradictory stories shown to be false, as to what two defendants had done with a certain child, convicted them both of murder. *And v. State*, 36 Tex. Cr. R. 76.

False statements as to what defendant did with his child are admissible to prove its murder. *Com. v. Johnson*, 162 Pa. 63.

It was shown in the case of *People v. Sliney*, 137 N. Y. 570, that the deceased was killed in his butcher shop with a cleaver. The defendant was seen there shortly before, holding a cleaver. The deceased's boy had been induced to leave by a forged note from a priest, written in red ink. The defendant had red ink stains on his hands. At one time he admitted writing the note, and at another time he denied it. At one time he admitted killing the deceased in self-defence, and at another time accused the brother of the deceased with the crime. The brother was shown to have been elsewhere at the time. The verdict was murder in the first degree.

#### *False Explanations of Blood Stains.*

Where the defendant explained certain blood stains on his person by saying that it was blood from a squirrel he had dressed, the

prosecution showed that the squirrel in question had been given to him already dressed. *Brown v. State*, 32 Tex. Cr. R. 119.

*False Explanations in Larceny.*

Where defendant had packed up certain goods of his employer and sent them by express to another city, and gave false explanations of his doing so, and it was shown that he had shipped other boxes in a similar manner, he was properly convicted of larceny. *May v. State*, 38 Neb. 211.

The defendant was convicted of the larceny of a hog on evidences of a bloody trail to accused's yard, a pool of blood there covered up, hair from a hog about the premises partly concealed, and the defendant's false explanation that the hair came from a chimney. *Harris v. State*, 62 Ga. 337.

Contradictory stories to explain the possession of a stolen dress suit and a silk doily. *Williams v. People*, 196 Ill. 173.

*This Evidence to be Carefully Scrutinized.*

That suspicious conduct is to be scrutinized with care is shown in the case of *Miller v. Terr.*, 3 Wash. T. 554, 19 Pac. 50. The defendant was an ignorant man, and was charged with murder. A motive, quite inadequate, existed. When arrested, he displayed agitation, and he appeared much moved when taken by the sheriff to the spot where the murder occurred. He was brought before the dead bodies and asked by the sheriff, "How do you feel in the presence of the evidence of your hellish crime?" He breathed deeply, looked away, and said nothing. A conviction was set aside because a well-established alibi showed it to have been practically impossible for him to have been on the spot when the killing was done.

*Ignorance of the Defendant to be Considered.*

"In cases depending upon indirect testimony, where the facts or circumstances established by direct proof point strongly to the guilt of the accused, his relation of the occurrence is frequently a matter of great importance. His statement, if true, may explain facts of a doubtful character, which otherwise would tend strongly to the conclusion of his guilt, and if it be reasonable and consistent in itself, should always have weight with the jury. On the other

hand, if it be unreasonable or contradictory and proved to be false, it must, upon acknowledged principles, increase the presumption of his guilt.

"In the case at bar, the evidence, strong if not conclusive, derives great weight from the strange account which she gave of the occurrence from the contradictory statements, and from the fact that her relation, in part at least, is proved to be false. Ignorant or weak-minded persons, innocent of the charge, when opposed by circumstances that question their innocence, not knowing that a true account of the matter would be their surest protection, frequently resort to prevarication and falsehood with a hope of delivery. But in the case under examination there is good reason to believe that the false and contradictory statements of the prisoner were the result of the guilt in which she was involved." *Cicely v. State*, 13 Smedes & M. (Miss.) 203, 223.

*Weight of Indirect Confessional Evidence.*

In the case of *McCann v. State*, 13 Smedes & M. (Miss.) 471, the proof was entirely circumstantial, and by far the greater part of it consisted of the indirect confessional evidence furnished by the prisoner himself. After reviewing all the other evidence, the Court says: "These are the circumstances as developed up to the time of the killing, and however much they point to the guilt of the prisoner, they may leave room for a reasonable doubt. But the evidence does not close here. By far the strongest portion has been furnished by the conduct and declarations of the prisoner, subsequent to the deed."

*Words and Actions Indicating Guilty Consciousness.*

Where the defendant was charged with the murder of a woman by strangling her on September 17th, it was allowed to be shown that on the 18th he was met by the sheriff, who had called the day before to serve a subpoena in chancery on the defendant, and that the following conversation occurred. The defendant said to the witness, "You were at my house yesterday — I was not at home." To which the witness replied, "No, but I found the woman." Whereupon defendant's countenance changed, he blushed, became embarrassed, and asked, "What did you say?" *Moore v. State*, 2 Ohio St. 500, 504.

*Confessions may be Implied from Conduct.*

Conkey *v.* People, 1 Abb. App. Dec. 418; People *v.* O'Neil, 49 Hun, 422, 17 N. Y. St. R. 956, 112 N. Y. 355; Greenleaf *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

Or from the act of a third person done in the presence of the accused. Hochreiter *v.* People, 2 Abb. App. Dec. 363.

The making of false statements after the alleged act, which would tend to give a wrong impression concerning the connection of the one sought to be held accountable with the act, may be shown. State *v.* Reed, 62 Me. 129; State *v.* Benner, 64 Me. 267; Com. *v.* Webster, 5 Cush. (Mass.) 316, 52 Am. Dec. 711; Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; State *v.* Reed, 62 Me. 129.

Willingness or unwillingness to be searched may be shown. Riley *v.* Gourley, 9 Conn. 161.

Where defendant was pursued and charged with picking a pocket, he denied the charge, but thrust a different purse upon the owner of the one taken, a \$10 bill upon her daughter, and then ran away. This evidence was held sufficient to sustain a conviction. People *v.* Howard, 50 Mich. 390.

A witness may testify that the defendant dodged, trembled, and became confused when met by the witness before the time of the arrest. Beavers *v.* State, 58 Ind. 530.

It may be proved in evidence that the defendant showed signs of trepidation when tracks leading from the scene of a murder toward defendant's house were compared with the feet of various bystanders. In point of fact they were found to correspond with the defendant's shoes. Wade *v.* State, 65 Ga. 756; Russell *v.* Com., 78 Va. 400.

In State *v.* Brown, 168 Mo. 449, it was shown that the defendant objected to having his shoes measured.

*Mental Preoccupation.*

A clerk, charged with a crime, may be shown to have been much preoccupied and absent-minded after the crime and to have made many mistakes. Noftinger *v.* State, 7 Tex. App. 301.

*Conduct when Arrested.*

The demeanor of the defendant at the time he was arrested may be proved. *Levison v. State*, 54 Ala. 519.

Resistance to arrest indicates guilt, and may be proved. *Probasco v. Cook*, 39 Mich. 717; *People v. Flannelly*, 128 Cal. 83; *Anderson v. State*, 147 Ind. 445.

Conduct at the time of his arrest is admissible against the defendant charged with murder, although he was actually being arrested for burglary, provided the defendant did not know for which crime he was being arrested. *People v. Higgins* (Mich.), 86 N. W. 812.

Defendant was accused of killing a marshal, who had arrested him, in Cameron, Mo. He was arrested in Kansas, refused to leave without requisition, said he had never been in Missouri, was much alarmed at his arrest, and asked if he was arrested for killing the marshal. This evidence was of great weight, because the identity of the murderer was doubtful. *State v. Cushenferry* (Mo.), 56 S. W. 737.

*Denial of Identity.*

The defendant may be shown to have denied his name when arrested (*State v. Van Winkle*, 80 Iowa, 15; *McCann v. State*, 13 Smedes & M. (Miss.) 471); and he may be shown to have been living under an assumed name. *State v. Whitson*, 111 N. C. 695.

*Conduct during Trial.*

The defendant's demeanor during the trial may be used as evidence of his guilt or innocence. "We know it to be a fact, grounded in human nature, that the conduct of a defendant or of a party to a suit during the trial is more or less potential, and has necessarily more or less influence with the Court and jury upon the question of his credibility." *Boykin v. People*, 22 Colo. 496.

*Attempts to Compromise.*

It may be shown that the defendant proposed to compromise the case, when so made as to indicate consciousness of guilt (*Barr v. People*, 113 Ill. 471 (rape); *State v. Rodrigues*, 45 La. Ann. 1040 (larceny); *McMath v. State*, 55 Ga. 303; *U. S. v.*

Hunter, Fed. Cas. 15424) ; as that he should take a whipping in lieu of other punishment. *State v. De Berry*, 92 N. C. 800.

### *Feigning Insanity.*

It may be shown that the defendant intentionally acted in such a manner as to indicate insanity. *Basham v. Com.*, 87 Ky. 440.

### *Evading Arrest.*

It is competent to show that the accused attempted to evade the officers. *People v. Taylor*, 3 N. Y. Cr. 297.

It may be shown that the defendant disguised himself and hid, under an assumed name, and denied his identity. *People v. Winthrop*, 118 Cal. 85.

It is also permissible to show that the defendant concealed himself to avoid arrest, or that he attempted to escape or actually escaped after arrest. *People v. Winthrop*, 118 Cal. 85 ; *Hitner v. State*, 19 Ind. 48 ; *State v. Rodman*, 62 Iowa, 456 ; *State v. Williams*, 54 Mo. 170.

Hiding or flight after the act, to avoid arrest, may be proved. *Com. v. Annis*, 15 Gray (Mass.), 197 ; *Com. v. Tolliver*, 119 Mass. 312 ; *Com. v. Brigham*, 147 Mass. 414.

In *Ryan v. People*, 79 N. Y. 601, the Court says: "The evidence that the defendant made an effort to keep out of the way of the sheriff was very slight, if any, evidence of guilt. There are so many reasons for such conduct consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt ; but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon surrounding circumstances."

Although the defendant may be shown to have changed his residence to avoid arrest, letters written to him and found on his person advising him to change his residence are not admissible. *People v. Lee Dick Lung*, 129 Cal. 491.

### *Flight.*

Instances where the flight of the accused was used as evidence of his guilt. *Starr v. U. S.*, 164 U. S. 227 ; *Com. v. Tolliver*, 119 Mass. 315 ; *State v. Frederic*, 69 Me. 400 ; *Burris v. State*, 38

Ark. 221; Com. 7. *Boschino*, 176 Pa. 103; Com. 7. *McMahon*, 145 Pa. 413.

"A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take a flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. But it is sufficient perhaps for all practical purposes to regard a flight as immediate evidence of crime, because it betrays conscious guilt. In this instance, then, we take the flight, a thing of itself harmless and innocent, as evidence of conscious guilt, a necessary consequence of the crime itself, and the conscious guilt, of which the flight was evidence, is proof in its turn of the crime. . . . Is flight the only outward evidence of conscious guilt? So far from it, any indications of it, arising from the conduct, demeanor, or expressions of the party, are legal evidence against him." *Johnson v. State*, 17 Ala. 618.

The flight and resistance to arrest of the defendant may be proved, even though the defendant merely pleaded self-defence. *People v. Flannelly*, 128 Cal. 83.

Flight and an attempt to sell the borrowed rifle with which a homicide had been done are admissible in evidence. *People v. Sullivan*, 129 Cal. 557.

Where the defendant was charged with murder, there was evidence that he had told certain parties that he had killed a man and needed money to travel on; that he had received money and fled, and was a fugitive until his arrest. *Washington v. State*, 19 Tex. App. 521, 53 Am. Rep. 387.

It may be shown that the defendant was under contract and was intending to begin work on a certain date, but that immediately after the crime in question was committed he left the neighborhood. *Welsh v. State*, 97 Ala. 1.

"A consciousness of innocence would have led him to abide the issue, and to see whether time would not disclose the real perpetrator. But he fled on the instant, and he must be content to bear whatever weight this circumstance furnishes against him. The consequences of his own act must fall on his own head. He was on his way before two o'clock of that day. The jury of inquest did not return their verdict until ten o'clock of that night; and up to that time, no whisper had been heard that he was

accused or suspected. His fears induced flight before the voice of accusation was raised." *McCann v. State*, 13 Smedes & M. (Miss.) 471, 495.

*Preparation to Fly.*

A telegram from the defendant offering to sell certain horses may be admitted with other circumstances as showing his preparation for immediate flight. *State v. Espinozei*, 20 Nev. 209.

The defendant may be shown to have prepared to fly before he committed the crime charged, by hiring a horse and buggy to leave the neighborhood that night. *Teague v. State*, 120 Ala. 309, 316.

*Flight of Accomplice.*

The defendant may be shown to have supplied the means for the flight of an alleged accomplice. *Jones v. State*, 64 Ind. 473; *State v. Hudson*, 50 Iowa, 157.

*Weight of Evidence in Case of Flight.*

"The breaking out of jail and escape of one under indictment for crime may arise from conscious guilt and the fear of trial therefor, and the dread of the punishment to follow; or it may be that the defendant, conscious of innocence, may dread trial lest he be convicted; or, again, with such consciousness of innocence, being confined in prison and unable to give bail, he would seek freedom in flight from the discomforts of such imprisonment. Different individuals might act differently under the same circumstances, owing to the difference in their minds, dispositions, and characters. Whether or not the motive for such an escape has its origin in the consciousness of guilt and the dread of being brought to justice, or whether it can be explained and attributed to some other innocent motive, are questions for the determination of the jury, under all the evidence in the cause. Of itself, such evidence would not warrant conviction, but it is relevant, and the weight to which it is entitled is for the jury under proper instructions from the Court." *Elmore v. State*, 98 Ala. 12, 13 So. 427.

The defendant's immediate flight after a murder, with proof that he had threatened the deceased and that he was present at the time of the shooting, is sufficient for conviction. *Com. v. Sal-yards*, 158 Pa. 501.

*Flight, Instructions to Jury.*

The following instruction has been held proper: "The flight of a prisoner suspected of crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case. . . . If you believe he did flee, upon the pursuit of the officers, that is a circumstance before you, along with the balance of the testimony in the case, the significance or insignificance of which is to be judged by you." *People v. Ross*, 115 Cal. 233, 235.

It is error to quote the Bible, in instructing the jury, to the effect that the wicked flee and the righteous do not, and to add: "That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." *Hickory v. U. S.*, 160 U. S. 408, 422.

In *Alberty v. U. S.*, 162 U. S. 499, 509, it was held to be error to instruct the jury "that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense, feeble or strong, as the case might be, a confession."

But the following instruction was held correct in *Allen v. U. S.*, 164 U. S. 492, 498. "Now, then, you consider his conduct at the time of the killing and his conduct afterwards. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him, because the law says unless it is satisfactorily explained, — and he may explain it upon some theory, and you are to say whether there is any effort to explain it in this case, — if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience that teaches to know whether we have done right or wrong in a given case."

*Forfeiting Bail.*

It may be shown that the defendant gave "straw bail," and at once forfeited it, and that he passed under a number of aliases. *Barron v. People*, 73 Ill. 256.

*Attempted Escape from Prison.*

In *Gannon v. People*, 127 Ill. 507, the defendant, charged with drowning his stepson, was shown to have expected to be accused with the crime before any accusation was made, and to have escaped twice with great desperation after his arrest.

Attempted escape of the defendant may be proved. *State v. Morgan* (Utah), 61 Pac. 527.

It may be shown that the defendant attempted to procure tools with which to break jail. *State v. Jackson*, 95 Mo. 623.

*Mental Emotion.*

"In the olden time it was a popular superstition that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt that he who was charged with the murder refused to lay his finger on the body or to take his hand; in recent years, persons suspected of murder have been required to touch the dead body, not because the old superstition was indulged, but that its effect on them — the emotion produced and manifested — could be observed." *Gassenheimer v. State*, 52 Ala. 316.

*Grief.*

It may be shown whether the defendant, charged with the murder of her sister, exhibited grief over her sister's death, but the evidence of the State must be restricted to manifestations within a reasonable time after the death, and four months is too long a time. *State v. Baldwin*, 36 Kan. 1.

*Implied Admission of Guilt.*

When the defendant was asked by an officer why he had killed his wife, he replied that he and not the officer would have to suffer for it. This was admissible in evidence. *Synon v. People*, 188 Ill. 609.

"His conduct at Carrollton is not easy to reconcile with a belief of his innocence. He exhibited great fear of being arrested; put his hand upon his pistol, and threw himself into a defensive attitude, when a stranger entered the room in which he was. He then stated the fact of the killing, and of the finding of the body

eaten up in part by the hogs, and said he had left, because he was the last person seen behind the old man, near Cross's Lane, before he was killed, and that it would be hard for him to prove himself clear. This declaration is decisive of his fate. It brings him to the very theatre of the murder, at the time it was committed, and if he did not do the deed himself, it is almost certain that he would have seen the person who did. He might then have saved himself by disclosing the real murderer. How did he know that he was the last person seen behind the old man before he was killed, unless he was the real murderer himself?" *McCann v. State*, 13 Smedes & M. (Miss.) 471, 496.

#### *Drunken Admissions.*

Statements made by the prisoner before his arrest to the effect that he had committed the crime charged, are admissible notwithstanding the fact that he was drunk when he made the statements, and he claims they were mere boastful talk and idle vaporings in a yarn-telling contest. *Horn v. State* (Wyo.), 73 Pac. 705.

#### *Silence as an Implied Confession.*

Keeping silence under certain circumstances may be an implied confession (*Sparf v. U. S.*, 156 U. S. 57; *Com. v. McCabe*, 163 Mass. 98; *Richards v. State*, 82 Wis. 172), even when under arrest. *Murphy v. State*, 36 Ohio St. 628; *Ackerson v. People*, 124 Ill. 563; *contra*, *State v. Howard*, 102 Mo. 142; *Com. v. McDermott*, 123 Mass. 440.

There must, however, be an opportunity to speak. Hence, no implication is to be drawn from silence at a coroner's inquest. *People v. Willett*, 92 N. Y. 29.

"So also, silence, unless it be accounted for by some of the circumstances which have been specified, or by other sufficient reason, may be taken as a tacit admission of the fact stated; because a person, knowing the truth or falsity of a statement affecting his right, made by another in his presence, under circumstances calling for a reply, will naturally deny it, if he be at liberty to do so, if he does not intend to admit it." *Donnelly v. State*, 26 N. J. L. 601, 613.

A confession may be implied from silence when one is charged

with a crime under circumstances justifying the expectation of a reply. *Ettinger v. Com.*, 98 Pa. 338.

"The rule is that a statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply unless he intends to admit it. But if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence." *Com. v. Brown*, 121 Mass. 69, 80.

"To a remark that it was strange he had fled before he was accused, he made no reply." This the Court regards as evidence against the defendant. *McCann v. State*, 13 Smedes & M. (Miss.) 497.

*Silence—when no Implication is Proper.*

"If it appeared that it was made in the course of a judicial inquiry, or when circumstances existed which rendered a reply inexpedient or improper, or that fear, doubts of his rights, or a belief that his security would be better promoted by silence than by a response, governed him at the time, then the testimony should not have been admitted; for the reason that the jury in such case ought not to have been allowed to infer anything against the prisoner from his silence." *Donnelly v. State*, 26 N. J. L. 601, 612.

The silence of the defendant when a witness made statements prejudicial to him on a former trial cannot be used as the basis of an inference against him, as it would not have been proper for him to be otherwise than silent. *Broyles v. State*, 47 Ind. 251.

The silence of an accused at a judicial inquiry into his guilt in the face of an accusation against him is no evidence of his guilt. *Com v. Zorambo*, 205 Pa. 109.

The defendant's silence in the face of accusations was held not to justify an inference against him where he showed that he had induced a friend to go with him to see his accusers on his promise not to lose his temper and to be upon his good behavior. *Slattery v. People*, 76 Ill. 217.

"If a defendant is charged with crime, and unequivocally denies it, and this is the whole conversation, it cannot be intro-

duced in evidence against him as an admission." *Fitz. v. Williams*, 148 Mass. 462.

*Conversations in the Presence of the Accused.*

Such conversations may be admissible against the defendant. *State v. Brown*, 64 N. J. L. 414.

"A conversation in the presence of an accused, and in part of which he participated, is admissible in evidence as a whole. Where a conversation involving statements tending to charge the accused with a crime takes place in his presence, and he remains silent, when the circumstances are such as to make it natural for him to speak, such conversation is competent evidence." *Conway v. State*, 118 Ind. 282, 21 N. E. 285.

*Explanations of Apparent Admissions.*

"If any part of a conversation with the defendant put in evidence tends to show directly or indirectly that he is guilty of the crime charged, the defendant has the right to have put in evidence all that was said to and by him at the same time, and relating to the same subject, although it is in his favor." *Com. v. Keyes*, 11 Gray, 323.

Facts explaining or qualifying a confession or which indicate its falsity are admissible. *People v. Fox*, 121 N. Y. 449.

*Suppression, Destruction, Fabrication, and Simulation of Evidence.*

"To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons, all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs." *Com. v. Webster*, 5 Cush. 295, 316.

*Suppression of Evidence.*

It may be shown that the accused concealed property illegally

obtained or illegally sold. *State v. Bruce*, 24 Me. 72; *Com. v. Wallace*, 123 Mass. 400; *Com. v. Welch*, 163 Mass. 372.

It may be shown that the accused commanded his wife to tell nothing. *Liles v. State*, 30 Ala. 24.

The motives of a third party who induced a witness for the State to leave the State for a bribe are not admissible. *Chelton v. State*, 45 Md. 560.

Failure to produce evidence is not necessarily suppression thereof. *McCabe v. Com. (Pa.)*, 8 Atl. 45.

#### *Intimidation of Witnesses.*

Where defendant was charged with arson, it was shown that he tried to intimidate certain witnesses against him. *State v. Millmeier (Iowa)*, 72 N. W. 275.

#### *Bribing Witnesses.*

It is competent to show that an agent of a party employed to collect testimony and interview witnesses has resorted to bribery even though he was not expressly authorized to employ such means. *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, reversing 66 N. Y. Supp. 533.

Evidence of bribery, while admissible, is not conclusive. It is proper to warn the jury not to give undue importance to such testimony. *Nowack v. Metropolitan St. Ry. Co.*, 166 N. Y. 433, 60 N. E. 32, reversing 66 N. Y. Supp. 533.

It may be shown that the defendant tried to bribe the officer arresting him. *Com. v. Wallace*, 123 Mass. 400.

#### *Influencing Witnesses.*

Where the defendant was charged with rape, a note written by him to the prosecutrix urging her to deny everything, to keep her promise, and not to write or say anything about the transaction, was held admissible in evidence. *State v. Mahoney (Mont.)*, 61 Pac. 647.

In *People v. Burt*, 64 N. Y. Supp. 417, 51 App. Div. 106, it was shown that the defendant, charged with murder, had attempted to get the one who sold him a revolver to keep still, to influence the testimony of other witnesses, and to manufacture a false alibi.

Attempts on the part of the defendant to influence witnesses or jurors are admissible in evidence. *People v. Mason*, 29 Mich. 31.

*Bribing of Jurors.*

It may be shown that the defendant attempted to bribe a juror. *State v. Case*, 93 N. C. 545, 53 Am. Rep. 471.

*Attempts to Divert Suspicion.*

In *Com. v. Webster*, 5 Cush. 295, evidence was allowed to show that the defendant had written with a pine stick having a wad of cotton on one end, three anonymous letters to the city marshal for the purpose of diverting suspicion away from the real scene of the murder.

“Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof; and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged, so as to create or divert suspicion and prevent the discovery of the truth. These, by care and vigilance, may generally be detected, because things are so ordered by Providence, — events and their incidents are so combined and linked together, — that real occurrences leave behind them vestiges, by which, if carefully followed, the true character of the occurrences themselves may be discovered. A familiar instance is, where a person has been slain by the hands of others, and circumstances are so arranged as to make it appear that the deceased committed suicide. In a case recorded as having actually occurred, the print of a bloody hand was discovered on the deceased. On examination, however, it was the print of a left hand upon the left hand of the deceased.” *Com. v. Webster*, 5 Cush. 295, 318.

It may be proved that to account for the absence of the deceased, alleged to have been murdered, the defendant spread reports that he had stolen a horse and gone to Texas. *Lancaster v. State*, 91 Tenn. 267.

In *State v. Tettaton*, 159 Mo. 354, where the defendant was charged with shooting his stepmother and her four children, and then burning the house and their bodies, he was found pretending to be unconscious in the yard with wounds inflicted by himself with his bloody knife found near by, although he claimed the wounds had been inflicted by two robbers.

In *Butler v. State* (Ark.), 63 S. W. 46, where defendant was charged with the murder of his daughter with an axe, he made an elaborate attempt to indicate the presence of another man in the house. When called immediately after the murder, he pretended to leap out of his bed, he seized his gun and fired at a supposed escaping man in the yard, and he had previously thrown the bloody axe into the yard.

*Destruction of Evidence.*

Voluntary destruction of an instrument raises a presumption that it was unfavorable to the party doing the act. *Jones v. Knauss*, 31 N. J. Eq. 609.

It may be shown that the defendant burned the building entered, to conceal his burglary. *Robertson v. State* (Fla.), 24 So. 474.

*Hasty Interment of Body.*

In *State v. Edmonson*, 131 Mo. 348, the defendant, charged with causing the death of a girl pregnant by him, by procuring an abortion, was shown to have urged her immediate burial.

*Contradictory Statements.*

Attention of jury may be called to contradictory statements of a prisoner in relation to the crime. *Cathcart v. Com.* 37 Pa. 108.

In *Baines v. State* (Tex.), 66 S. W. 847, the defendant introduced evidence of an alibi, and the State proved his statements after his arrest to the effect that he had been alone at his home.

Contradictory and improbable statements by the accused as to an attack by a band of five robbers who killed all the members of the family while she alone escaped, such statements being shown to be false. *Cicely v. State*, 13 Smedes & M. (Miss.) 203.

*False or Evasive Testimony.*

Falsehood and evasion by the accused are proper evidence upon the question of his guilt or innocence. *People v. Conroy*, 97 N. Y. 62, 80, 2 N. Y. Cr. 565, 33 Hun, 119.

In *Fuller v. State*, 109 Ga. 809, the defendant was shown to have denied all knowledge of the crime at first and to have testified later that a co-defendant committed the murder in his presence.

The defendant may be shown to have denied, at the time of his arrest, that he had been near the scene of the crime for three months, while at the trial he does not deny being there. *State v. Hudson* (Iowa), 80 N. W. 232.

In *People v. Driscoll*, 107 N. Y. 414, the defendant, charged with murder, claimed that the shooting was done by one M. Deceased had been shot in M's house and defendant was outside. But the State proved that the defendant and the deceased had gone to M's house to kill him, that deceased got inside, but defendant failed, and that defendant then fired through the door. The deceased at first said M killed her, but later said it was the defendant. M fled, but returned and gave up his pistol, fully loaded, with no sign of a recent discharge. The defendant denied having been at M's house at all. He was convicted of murder.

Where the defendant claimed that the deceased fired at him first, the State proved that the deceased had no gun, that four shots were fired, and that four chambers of defendant's revolver were empty. *Clark v. Com.*, 90 Va. 360.

*False Claim of Accident set up at Trial for First Time.*

Where defendant claimed that the shooting was an accident, his testimony was much weakened by proof that at the time of the shooting, and in conversation with witnesses afterwards, he had said nothing about its being accidental. *Foster v. State*, 74 Tenn. 213. And in *State v. Sterrett*, 80 Iowa, 609, where a similar claim of accident was made at the trial, it was shown that defendant had formerly said that he shot deceased because of the latter's abuse.

*Fabricating Evidence.*

That one has attempted to fabricate evidence for the purposes of defence may be shown (*People v. Bassford*, 3 N. Y. Cr. 219; *McMeen v. Com.*, 114 Pa. 300; *State v. Williams*, 27 Vt. 226; *Lyons v. Lawrence*, 12 Ill. App. 53; *Heslop v. Heslop*, 82 Pa. 537); and efforts to secure the absence of witnesses (*State v. Barron*, 37 Vt. 57; *State v. Nocton*, 121 Mo. 537); and attempts to bribe a juror (*Hastings v. Stetson*, 130 Mass. 76; *Taylor v. Gilman*, 60 N. H. 506); or to escape justice. *State v. Frederic*, 69 Me. 400; *State v. Palmer*, 60 N. H. 216, 20 Atl. 6; *Hickory v. U. S.*, 160 U. S. 408.

The following instruction was held proper: "You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him, because the law says that he who resorts to perjury, he who resorts to subornation of perjury to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt." *Allen v. U. S.*, 164 U. S. 492, 498.

Where defendant was charged with wife murder, his attempt to prove an alibi was overthrown by convincing evidence; and a letter that he produced, purporting to be from his wife, confessing her infidelity and indicating that she would commit suicide, was shown by the State not to be in the wife's handwriting. *People v. Hamilton*, 137 N. Y. 531.

"The fabrication of an alibi, like the wilful introduction of false and fabricated evidence in support of any other ground of defence, is a circumstance against the accused." *White v. State*, 31 Ind. 262.

#### *False Alibi.*

In *People v. Durrant*, 116 Cal. 179, where the defendant was charged with the murder of a girl in a church at 3 P. M., he alleged that at that time he was attending a lecture on the sterilization of milk at a Medical College where he was a student, and he produced his original notes of the lecture in corroboration of his statement. But the State showed that he had, after his arrest, secretly called in a fellow student and told him that he had no such notes and needed them to support his alibi, and that the fellow student thereupon promised to lend him his, proposing two methods by which the defendant could get them into his notebook.

Where defendants accused of murder set up an alibi, the prosecution may explain the presence of the accused at the distant place by proof that they rode away on horses belonging to a certain person who found his horses and saddles gone. *Com. v. Roddy*, 184 Pa. 274.

In *State v. Howard*, 118 Mo. 127, the defendant, charged with murder, attempted to prove an alibi, but his witnesses were im-

peached and the testimony as to his having been near the scene of the crime was convincing.

*Failure to Explain Suspicious Circumstances.*

"The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever, then, a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man, who can, explain that which unexplained will stamp him a criminal and consign him to the felon's cell? The criminal law furnishes in its rules more than one illustration of this principle. The possession of recently stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists." *State v. Grebe*, 17 Kan. 458.

*Failure to Call Witnesses.*

The failure of the accused to produce witnesses accessible to him may be considered as tending to strengthen the evidence given against him. *People v. Grimshaw*, 33 Hun, 505, 510, 2 N. Y. Cr. 390.

Evidence to account for the absence of a witness may be introduced, as, for instance, that he is under arrest. *Pease v. Smith*, 5 Lans. 519, 61 N. Y. 477.

For limitations of the rule, see *Ward v. St. Vincent's Hospital*, 72 N. Y. Supp. 587.

Where a party takes every step to compel the attendance of the witness, his failure to appear is not to be considered as affecting his case. Judgment (1895), 35 N. Y. Supp. 325, 89 Hun, 449, affirmed; *Manhattan Life Ins. Co. v. Alexander*, 53 N. E. 1127, 158 N. Y. 732.

No presumption as to what a witness's testimony would be from failure to call him. *Com. v. McMahon*, 145 Pa. 413.

Failure to call an alleged paramour to testify, although within easy reach, is significant of guilt. *Bibby v. Bibby*, 33 N. J. Eq. 56.

In Georgia the statute creates a presumption that a charge is well founded if the party fails to introduce evidence in his power, or introduces inferior evidence when he could have produced better. Code 1895, § 5163, Cr. C. § 989.

#### *Failure to Testify.*

Failure of an accused to become a witness may be considered by the jury. *Parker v. State*, 61 N. J. L. 308.

The failure of a party to appear and testify may be considered, and such failure may be explained on his part by showing circumstances which prevented him from giving his evidence. *Brown v. Barse*, 10 App. Div. 444, 42 N. Y. Supp. 306.

The non-attendance of the plaintiff who has personal knowledge of the transaction to appear and testify on the trial is a circumstance to be considered by the jury. *Brooks v. Steen*, 6 Hun, 516.

#### *Failure to Testify.*

Failure to testify when accused of fraud raises a presumption against one. *Dawson v. Waltemeyer*, 91 Md. 328.

The prosecuting attorney may comment to the jury on the failure of the accused to deny as a witness the allegations of the State. *Brashears v. State*, 58 Md. 563.

#### *Scientific Testimony.*

"When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts. Such persons are herein-after called experts. The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion, and amongst others the examination of handwriting." *Stephen's Dig. Evid.*, Art. 49.

*Qualification of Experts.*

In *State v. Hinkle*, 6 Iowa, 380, two physicians were allowed to testify as to tests they made upon the stomach of the deceased, for the detection of poison, even though they both admitted that they were not practical chemists and were inexperienced in detecting poisons. After admitting that the testimony should be given less weight, the Court says: "But to say that none shall be permitted to give their opinions, except those of the highest professional skill or those who had given their lives to chemical experiments, would, in this country at least, render it impossible, in most cases, to find the requisite skill and ability."

A person in reality a medical expert can give his opinion, although he has no license to practise; however, the Court will receive his testimony only when made satisfied of his competency as an expert.

Pursuit for an indefinite time of the study of medicine, and incidentally of nervous diseases, and the fact that he is a manufacturer of medicines as well as the publisher of books on medicine, also that he is the author of one, without giving its subject, however, do not qualify a witness to testify as an expert on insanity. *People v. Rice*, 54 N. E. 48, 159 N. Y. 400.

An undertaker's assistant held not to be qualified as an expert to testify as to when *rigor mortis* sets in after death. *Com. v. Farrell*, 187 Pa. 408.

*Value of Expert Testimony.*

In *State v. Kelly*, 77 Conn. 266, 275, it is said: "The State introduced the testimony of experts to establish the cause of death. The accused asked the Court to charge that the evidence of experts is of the very lowest order, and the most unsatisfactory character, and that all testimony founded on opinion merely is weak and uncertain, and should in every case be weighed with great caution. The Court declined to so charge, and instructed the jury in effect that such testimony was to be weighed and judged like any other, and the same tests applied thereto, the considerations which ought to enter into such judgment being quite fully stated. The Court was correct in refusing the request. *State v. Rathbun*, 74 Conn. 524."

Although the competency of an expert is a question for the Court, the weight to be given to his testimony is for the jury, and they may consider the extent of his qualifications. The following instruction has been upheld: "You are the judges of the weight to be given to such testimony, taking into consideration the knowledge of said witnesses, or the want of it, the disagreement of the experts, if any, and also the further fact whether they or any of them are practical chemists, or whether they or any of them have little or great knowledge of chemistry." *State v. Cole*, 63 Iowa, 695.

In *Parnell v. Com.*, 86 Pa. 260, where the defendant's sanity was to be determined, it was held error for the trial court to express a doubt to the jury as to "whether you will realize much, if any, valuable aid from them (medical experts) in coming to a correct conclusion as regards the responsibility for crime by this prisoner."

In regard to the weight of expert testimony as to insanity, the jury in *State v. Windsor*, 5 Harr. (Del.) 512, 542, was instructed: "Such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of the jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration."

#### *Poisoning Cases.*

A physician, after a minute microscopical examination of the stomach and intestines of the person alleged to have been poisoned, may testify that he found "tartar emetic," and that, in his opinion, it was the cause of the death. *State v. Fournier*, 68 Vt. 262.

Experts who have made an analysis may testify as to finding poisons in the body of the deceased. *State v. Bowman*, 78 N. C. 509.

In the case of *Com. v. Hobbs*, 140 Mass. 443, the defendant was charged with attempting to poison another by mixing white arsenic with certain rye and Indian meal used by that other. It was shown that the defendant had bought two boxes of "Rough

on Rats." A chemist was allowed to testify that he had analyzed certain bread baked from the meal, and also certain samples of the meal, and that they contained white arsenic; also that he had analyzed samples of the trade substance known as "Rough on Rats," though not the contents of the particular boxes bought by the defendant, and found that the substance was white arsenic colored with lampblack.

In *State v. Cole*, 94 N. C. 958, the defendant was charged with murdering his wife with strychnia. Her body was exhumed several months after death, the stomach removed by two physicians and sealed in a glass jar, and turned over to a chemist and toxicologist for analysis. He testified that he had found strychnia, and that it had caused death.

An expert was allowed in *State v. Slagh*, 83 N. C. 630, to state his opinion that a mixture contained certain poisonous ingredients, without having made an analysis, but merely from the taste, smell, and appearance.

A physician may testify as an expert as to the symptoms to be expected to follow the administration of a certain poison, or as to the effect of a poison on the human system. *State v. Cook*, 17 Kan. 392; *State v. Terrill*, 12 Rich. (S. C.) 321.

A chemist and toxicologist may testify as to the finding of poison in the stomach of the deceased, and as to the effect it would have upon the human system, even though he is not a physician. *State v. Cook*, 17 Kan. 392.

A physician who has no knowledge of the effects of a certain substance, except that it killed a cat upon which he tried it, cannot, in a homicide case, testify that it was a poison. *Rose v. State*, 7 Circ. Dec. 226, 13 Ohio Circ. Ct. 342, 56 Ohio St. 779.

There is no presumption that the chemicals used to detect poison were impure. *Dyer v. State*, 74 Ind. 594.

### *Blood Stains.*

Experts are allowed to testify that they can determine whether certain blood is human or not, and further, as to whether the blood in question is human. *Com. v. Sturtivant*, 117 Mass. 122; *State v. Knight*, 43 Me. 1, 133; *Knoll v. State*, 55 Wis. 249.

Evidence of physician that certain spots on overalls were blood

admissible. *Com. v. Crossmire*, 156 Pa. 304; See *McLain v. Com.*, 99 Pa. 86.

Evidence of a test by physicians as to a spot of supposed blood on the defendant's clothing is admissible. *Beavers v. State*, 58 Ind. 530.

One not an expert may be permitted to testify that certain spots were blood stains. "We have given due consideration to the able argument of the prisoner's counsel, to the effect that uneducated and ignorant men are incompetent to testify under the circumstances, and that it is alone within the province of experienced and scientific experts to give evidence on the subject; but we are, after careful investigation, brought to the conclusion, that in many instances the ordinary mind may be able to determine from observation and experience the character of such stains."

In *People v. Gonzales* (35 N. Y. 49), it was held that stains of blood upon the person and clothing worn by the accused on the night of the murder may be shown by persons who are not experts, and matters of common observation may ordinarily be proved by those who witness them, without resorting to scientific or mechanical tests to verify them with definite precision. It is said, in the opinion by Porter, J.: "The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other, with the jury, the exclusion of either would be illegal." *People v. Greenfield*, 85 N. Y. 75, 39 Am. Rep. 636.

Stains may be proved to be blood, even though no analysis is made. It is for the jury to say whether the proof is sufficient. *Gaines v. Com.*, 50 Pa. 330.

### *Experiments.*

An expert may give an account of experiments performed by him for the purpose of forming his opinion. *Sullivan v. Com.*, 3 Pa. 284.

Evidence of experiments to test the truth of testimony as to certain occurrences may be admissible if it is clear that they were performed under the same circumstances as existed at the time of the original occurrence. *People v. Levine*, 85 Cal. 39 (length of time for a candle to burn a certain amount); *People v. Morrigan*, 29

Mich. 5 (possibility of taking a certain pocket-book through a slit in a coat since mended); *People v. Clark*, 84 Cal. 573 (distance at which the discharge of a gun will burn clothing); *Starr v. People* (Colo.), 63 Pac. 299 (distance a certain conversation could have been heard); *Wilson v. State* (Tex.), 36 S. W. 587 (same); *State v. Flint*, 60 Vt. 304 (time required to walk between two places); *Moore v. State*, 96 Tenn. 209 (relative positions of accused and deceased when a shot was fired); *Sullivan v. Com.*, 93 Pa. 284 (powder marks).

#### *Cause and Nature of an Injury.*

Expert opinion is admissible as to the nature and effect of an injury, and also as to how it was caused. *Williams v. State*, 64 Md. 384.

A medical expert may testify as to what, in his opinion, caused a hole in the skull of deceased. *Davis v. State*, 38 Md. 15.

#### *Means of Producing Death.*

Expert evidence may be admissible as to the means by which death was produced. In *People v. Durrant*, 116 Cal. 179, 210, the Court says as follows: "Dr. Barret was shown to be a practising physician and surgeon. He performed the autopsy upon the body of the dead girl, gave evidence of its condition, and expressed his judgment that the cause of death was strangulation. He was then asked: 'What in your judgment was the means used for the strangulation?' The witness answered: 'I think the means used were hands.'"

#### *Rape.*

Expert testimony is admissible in rape cases to determine whether or not there was penetration. *State v. Smith*, Philip's (N. C.) Law, 302; *State v. Knapp*, 45 N. H. 148.

And in *Richardson's Medical Microscopy*, 299, it is said that by the use of the microscope, stains upon the female's clothing may be shown with absolute certainty to be seminal stains.

#### *Abortion.*

Experts may testify as to the drugs and instruments with which an abortion can be produced, and whether an abortion has been

performed. *State v. Smith*, 32 Me. 370; *Reg. v. Still*, 30 Upper Can. (C. P.) 30; *Com. v. Brown*, 121 Mass. 69.

*Pregnancy.*

Scientific testimony is admissible on the question of the conditions under which pregnancy may occur. *Young v. Johnson*, 123 N. Y. 232.

*Identification of Wood.*

Skilled woodworkers have been allowed to testify that a block found in a box used for incendiary purposes was originally part of the same stick as other pieces found in the defendant's workshop, the object of the testimony being to connect the defendant with the crime of arson where an exactly similar box had been used. *Com. v. Choate*, 105 Mass. 451.



## CHAPTER IV.

### EXTRINSIC AND MECHANICAL INCULPATORY INDICATIONS.

INCULPATORY circumstances of an extrinsic and mechanical nature, are such as are derived from the physical peculiarities and characteristics of persons and things,—from facts and objects which bear a relation to our corporeal nature, and are apparently independent of moral indications. Such facts are intimately related to, and as it were dovetail with, the *corpus delicti*; and they are the links which establish the connection between the guilty act and its visible moral origin. It is impossible even to classify, and still less to enumerate, evidentiary facts of the kind in question, except in a very general way; but it may be interesting and instructive, by way of illustration, to advert to some of the principal heads of such evidence, and to some remarkable cases which have occurred in the records of our criminal jurisprudence. One important and admonitory result of such a process will be to show that all such facts are unavoidably associated with attendant sources of error and fallacy.

The principal facts of circumstantial evidence of an external character relate to questions of identity—of person—of things—of handwriting—and of time; but there must necessarily be a number of isolated facts which admit of no specific classification.

## SECTION I.

## IDENTIFICATION OF PERSON.

IN the investigation of every allegation of legal crime, it is fundamentally requisite to establish, by direct or circumstantial evidence, the identity of the individual accused as the party who committed the imputed offence. It might be concluded, by persons not conversant with judicial proceedings, that identification is seldom attended with serious difficulty : but such is not the case. Illustrations are numerous to show that what are supposed to be the clearest intimations of the senses, are sometimes fallacious and deceptive, and some extraordinary cases have occurred of mistaken personal identity (*a*). Hence the particularity, and as unreflecting persons too hastily conclude, the frivolous minuteness of inquiry, by professional advocates as to the *causa scientiæ*, in cases of controverted identity, whether of persons or of things.

Two men were convicted before Mr. Justice Grose of a murder, and executed ; and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder ; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed (*b*).

(*a*) *Rex v. Wood and Brown*, p. 41, *supra* ; *Rex v. Coleman*, pp. 103 and 110, *supra*. In *Reg. v. Markham* (C. C. C. 1856) a man was sentenced to four years' penal servitude for uttering a forged cheque, but was subsequently pardoned on the conviction of the real offender.

(*b*) *Rex v. Clinch and Mackley*, Paris & Fonblanque, *Medical Jurisprudence*, vol. iii., p. 144 (note), and Sess. Papers, 1797.

A young man was tried at the Old Bailey, July, 1824, on five indictments for different acts of theft. It appeared that a person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewellery, and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an *alibi* was as clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and those persons deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. He was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which the conviction had taken place (c)

A few months before the last-mentioned case, a respectable young man was tried for a highway robbery committed at Bethnal Green, in which

(c) *Rex v. Robinson*, O.B. Sessions Papers, 1824.

neighbourhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman, to whom the prisoner paid his addresses, gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor was again put into the witness-box, and addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put, Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offence and executed; and before his death acknowledged that he had committed the robbery in question (*d*). Upon a trial for burglary, where there was conflicting evidence as to the identity of the prisoner, Mr. Baron Bolland, after remarking upon the risk incurred in pronouncing on evidence of identity exposed to such doubt, said that when at the bar, he had prosecuted a woman for child-stealing, tracing her buying ribbons and other articles at

(*d*) Paris & Fonblanque, Medical Jurisprudence, vol. iii., p. 143 (note b); Amos's Great Oyer of Poisoning (the trial of the *Earl of Somerset*), at p. 265.

various places in London, and at last into a coach at Bishopsgate, by eleven witnesses, whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterwards prosecuted the very woman who really stole the child, and traced her by thirteen witnesses. "These contradictions," said the learned judge, "make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof" (*e*).

As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion. A man was tried in January, 1799, for shooting at three Bow Street officers, who, in consequence of several robberies having been committed near Hounslow, were employed to scour that neighbourhood. They were attacked in a post-chaise by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that from the flash of the pistols he could distinctly see that one of the robbers rode a dark-brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders, that he could select him out of fifty horses, and had seen him since at a stable in Long Acre; and that he also perceived that the person at the side glass had on a rough shag great-coat (*f*).

(*e*) *Rex v. Sawyer*, Reading Assizes.

(*f*) *Rex v. Haines*, *Paris & Fonblanque*, Medical Jurisprudence, vol. iii., p. 144 (note).

Similar evidence was given on a trial for high treason (*g*); and in a case of burglary before the Special Commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-coloured top-coat and a dark-coloured handkerchief, and was a large man, from which circumstances and from his voice, he believed the prisoner to be the same man (*h*). In another

(*g*) *Rex v. Byrne*, 28 St. Tr. 819.

(*h*) *Rex v. Brook*, 31 St. Tr. 1135, 1137; but see "Traité de la Preuve," par Desquiron, 274, where it is stated that after the condemnation of a man for murder, on the testimony of two witnesses, who deposed that they recognized him by the light from the discharge of a gun, experiments were made, from which it appeared that such recognition was impossible.

The late learned Recorder of Birmingham (M. D. Hill, Esq., Q.C.) gave the Editor the particulars of a remarkable case, in which he was retained as counsel for a prisoner accused of shooting at a young woman, and in which the intended victim was prepared to swear that she recognized the prisoner by the flash of the gun which was fired at her. The trial, which was to have taken place at the Derby Spring Assizes, 1840, was prevented by the suicide of the prisoner, after the business of the Assizes had begun; but Mr. Hill was present at a series of experiments made with a view to test the possibility of the alleged recognition, and the conclusion he drew was "that all stories of recognition from the flash of gun or pistol must be founded upon a fallacy." There were many circumstances in the case calculated to produce a strong impression on the young woman's mind that the prisoner was her assailant, and she doubtless mistook the impression so created for ocular demonstration. On the other hand, it is asserted in Taylor's Medical Jurisprudence (4th ed. 1894, vol. i., p. 729) that from information which the author was able to collect on this point, there appears to be no doubt that an assailant may be thus occasionally identified. No doubt it depends largely upon the quickness of individual sight.

case a gentleman who was shot at while driving home in his gig, and wounded in the elbow, stated that when he observed the flash of the gun, he saw that it was levelled towards him, and that the light enabled him to recognize at once the features of the accused. On cross-examination he stated that he was quite sure he could see him, and that he was not mistaken as to his identity ; but the prisoner was acquitted (*i*).

A great deal of the value of direct evidence of identification must depend upon the personal appearance of the subject of identification. There are some men with peculiarities and characteristics so marked that only a very careless observer (of whom, however, there are a great number) could well be wrong about them. There are others—and a far greater number—whose features and persons are of the very commonest types, and who are hardly distinguishable by a casual observer from hundreds to be met every day in the streets. The physical characteristics of the subject of identification may be of the one category or the other, or may belong to any one of the infinite gradations between the two extremes. Fortunately the tribunal has the advantage of seeing the person sought to be identified, and the foregoing considerations can always be brought home to the minds of the jurors.

It may not be out of place to mention a remarkable case which illustrates the difficulties surrounding the determination of personal identity. A man was

(*i*) *Reg. v. White*, Croydon Summer Assizes, 1839. Mentioned in Taylor's Medical Jurisprudence, 4th ed. 1894, vol. i. p. 729.

tried at Manchester for housebreaking. He was convicted. A part of the indictment alleged that he had been previously convicted of a similar offence. A warder from the convict prison from which it was alleged that the prisoner had been discharged on completing his former sentence, deposed that the prisoner was the same man, and that he had served his former sentence as James Williams. The prisoner, who vehemently protested that a mistake had been made, elicited from the warder that upon the discharge of James Williams a list had been made of the marks of identification upon him. The list was produced, and the gaol surgeon was requested to take the prisoner to the cells and report what marks he had upon him. He returned with a list which differed very materially from the warder's list, containing some obvious marks which were not in the warder's list, and not containing others which were in that list. In particular the prisoner had upon his stomach a large mark of discolouration ("probably congenital," said the surgeon) which was not in the warder's list. Photographs of James Williams were produced by the warder, and at the request of the jury the prisoner was placed in various positions, and under various lights, for the purpose of comparison. In the end the jury found that the prisoner was not James Williams, and he received the mitigated sentence due to a first conviction for an offence of this kind. When in prison he memorialized the Home Secretary, complaining of some action on the part of the prison authorities. This led to an investigation, in the course of which a petition from James Williams,

dated from Chatham convict prison, was found in the archives of the Home Office, and both petitions were sent by the Home Secretary to the judge who tried the case. There was not then room for the smallest doubt as to the identity of the prisoner with James Williams. Not only were the two hand-writings identical, but there was a peculiar vein of thought and character running through both petitions which could hardly by any possibility have been common to two different persons. The man was of the kind known to seamen as "sea lawyers," and with a very peculiar vein of querulousness eminently characteristic. There is not the slightest doubt that the warder was right in his identification (*j*). The editor is glad to be able to add that during his experience of between seventeen and eighteen years on the Bench, he has met with but one instance of mistake upon the question of previous conviction (*k*). Upon his sending for the offending witness, and speaking to him of the great gravity of such a mistake, the man (a warder from one of the large London prisons) said in extenuation, "My lord, I identify three thousand a year!"

The liability to mistake must necessarily be greater where the question of identity is matter of deduction and inference, than where it is the subject of direct evidence. The circumstances from which identity may be thus inferred are innumerable, and admit of only a very general classification.

(*j*) *R. v. Henry Evans*, Manchester Winter Assizes, 27th January, 1885, *coram* Wills, J.

(*k*) *R. v. Helsham*, Liverpool Autumn Assizes, 12th November, 1885.

Family likeness has often been insisted upon as a reason for inferring parentage and identity. In the Douglas case Lord Mansfield said: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action" (*l*). But in a case in Scotland, where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father, was held not to be relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence (*m*). In another Scotch case, however—a trial for child-murder—it was permitted (after proof that the child had six toes) to ask a witness whether any members of the prisoner's family had supernumerary fingers and toes; though the inference to be deduced was evidently only matter of opinion (*n*).

(*l*) 2 Collectanea Juridica, 402; Beck's Medical Jurisprudence, 7th ed. p. 402. And see Report of the case of *Doe d. Day v. Day*, Trial by Ejectment involving a question of Legitimacy, &c., Huntingdon Assizes, July, 1797. Printed at Birmingham, 1823.

(*m*) *Rutledge v. Carruthers*, Tait's Law of Ev. 2nd ed. p. 441.

(*n*) 1 Dickson's Law of Ev. in Scotland, § 19, p. 14.

A case of capital conviction occurred a few years ago where the prisoner had given his portrait to a youth, which enabled the police, after watching a month in London, to recognize and apprehend him (*o*); and photographic likenesses now frequently lead to the identification of offenders. It is well known that shepherds readily identify their sheep, however intermingled with others (*p*); and offenders are not unfrequently recognized by the voice (*q*). Circumstances frequently contribute to identification, by confining suspicion and limiting the range of inquiry to a class of persons; as where crimes have been committed by left-handed persons (*r*); or where, notwithstanding simulated appearances of external violence and infraction, the offenders must have been domestics; as in a case of two persons convicted of murder, who created an alarm from within the house; but upon whom nevertheless suspicion fell, from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any

(*o*) *Rex v. Arden*, 8 London Medical Gazette, 36; but identification by photograph alone is regarded with suspicion, and the Court will not act upon it except in very exceptional circumstances. *Frith v. Frith*, 1896, P. 74.

(*p*) *Rex v. Oliver*, Syme's Justiciary Report (Scotch), p. 224.

(*q*) *Rex v. Brook*, 31 St. Tr., cols. 1124, 1129, 1137.

(*r*) *Rex v. Okeman and others*, 14 St. Tr., col. 1324; *Rex v. Richardson*—see pp. 384-389, *infra*, and in *Rex v. Patch*, which is given at length at pp. 390-395, *infra*. One of the circumstances which connected the accused with the crime was that the murderer must have hidden his body behind the door, and fired the shot with his left hand, or he would have been seen; and the prisoner was proved to be left-handed.

other than inmates (*s*). On the trial of a gentleman's valet for the murder of his master, it appeared that there were marks on the back door of the house, as if it had been broken into, but the force had been applied from within, and the only way by which this door could be approached from the back, was over a wall, covered with dust which lay undisturbed, or over some tiling, so old and perished that it would not have borne the weight of a man; so that the appearances of burglarious entry must have been contrived by a domestic. Other facts conclusively fixed the prisoner as the murderer (*t*).

Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti* (*u*); or by means of wounds or marks inflicted upon the person of the offender.

A coloured man, named Allen, was charged at Cardiff Assizes, in 1889, with the murder of George Kent. He was identified and convicted upon the following evidence:—The dead man's wife saw that her husband's assailant was a black man, and fired a revolver at him. He fell; but afterwards escaped. A few hours later the prisoner was arrested, and

(*s*) *Rex v. Swan and Jefferys*, 18 St. Tr., col. 1194; and see Mascardus, De Probationibus, Concl. cclxxii.

(*t*) *Reg. v. Courvoisier*. See p. 398, *infra*.

(*u*) See Mascardus, De Probationibus Concl. Dcccxxxi.

a bullet extracted from his thigh which fitted the empty cartridge case (x).

A woman who was tried for setting the prosecutor's ricks on fire, had been met near the ricks, about two hours after midnight, and a tinder-box was found near the spot containing some unburnt cotton rag; also, a piece of a woman's neckerchief was found in one of the ricks where the fire had been extinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the colour, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing-silk of the same quality (whereas articles of that description were generally sewn with cotton), he inferred that they were the work of the same person. The prisoner was capitally convicted, but, there being reason to believe that she was of unsound mind, she was reprieved (y).

A man was connected with the robbery of a bank, by the fragment of a key found in the lock of one of

(x) *Reg. v. Allen*. See *The Times*, March 19th, 1889.

(y) *Rex v. Hodges*, Warwick Spring Assizes, 1818, *coram* Garrow, B.

the safes, which an ironmonger proved that he had shortly before made for the prisoner (*z*); and a servant-man was connected with the larceny of a number of sovereigns, by the discovery, in the lock of a bureau which had been broken open, of a small piece of steel which had formed part of the blade of a knife belonging to him (*a*). A young woman was tried at Warwick Summer Assizes, 1887, for the murder of her illegitimate female child. She had been staying at the house of her mother, Charlotte Dodd, at Wellesbourne, a few miles from Warwick. She had the child, then about six weeks old, with her. On the 26th April, carrying her child, she walked with her mother to Warwick, where they stayed some little time at an inn. Not long afterwards the prisoner was seen standing near a bridge over a little watercourse on the Kenilworth road, about two miles from Warwick. Later in the day she was in Warwick again, without the baby. Her account was that she had taken it to Kenilworth, where "the young man" lived; that the grandparents had taken the child, and the grandfather had driven her back to Warwick in his trap. "The young man" did live at Kenilworth, but all the other statements were false. On the 28th April the body of a female child was found in the watercourse and under the bridge. It was not known whose child it was, and, although an inquest was held, the child was buried without being identified—and when

(*z*) *Rex v. Heath*, Alison's Principles of the Criminal Law of Scotland, vol. i. p. 318.

(*a*) *Reg. v. Crump*, Stafford Summer Assizes, 1851, *coram* Erle, J.

afterwards exhumed, on the 12th May, it was very much decomposed. The child's skull was fractured in such a way as to render it improbable that death was accidental. There were many circumstances tending to incriminate the prisoner, if the child found was hers. The evidence to show that it was her child was as follows: The child was wrapped in a piece of brown paper, and tied round with very fine braid. In the mother's house was found a piece of brown paper corresponding in quality and appearance with that in which the child was wrapped. On both pieces of paper were a number of stitches of black thread, which had been cut. On the paper in which the child was wrapped was written, "Dodd, passenger to Milverton"—faint, but distinctly visible. Some braid was found in the mother's house, discoloured, but in all other respects corresponding with the braid with which the child's body was tied up. No clothes were found with the child. The prisoner had brought the clothes back to Warwick, saying that the grandparents would not have them, as they had plenty; which was false. Baby's clothes were found in the mother's house. The prisoner was convicted. The mother was tried with her, but acquitted (b). An attempt to murder, by sending to the prosecutor a parcel, consisting of a tin case containing several pounds of gunpowder, so packed as to explode by the ignition of detonating powder, enclosed between two pieces of paper, connected with a match fastened to the lid and bottom of the box, was brought home to the prisoner by the circumstance that underneath

(b) *R. v. Fanny Goldsby and Charlotte Dodd*, August 2nd, 1887, *coram* Wills, J.

the outer covering of brown paper was found a portion of the *Leeds Intelligencer* of the 5th of July, 1832, the remaining portion of which identical paper was found in his house (*c*). In other cases identification has been established by the correspondence of the wadding of a pistol, which stuck in a wound, and was part of a ballad, which corresponded with another part found in the prisoner's possession (*d*); and by the like correspondence of the wadding of firearms with part of a newspaper of which the remainder was found in the possession of the prisoner (*e*).

A Spaniard was convicted of having occasioned a grievous injury to an officer of the post-office, by means of several packets containing fulminating powder, put by him into the post-office, one of which exploded in the act of stamping. The letters,

(*c*) *Rex v. Mountford*, reported on a point of law in 1 Moo. C. C. 441.

(*d*) *Ex relatione* Lord Eldon, when Lord Chancellor, in the House of Lords, November 10th, 1820. See Hansard Parliamentary Debates, New Series, vol. iii., at col. 1740. Probably Lord Eldon was referring to the case of John Toms, tried at Lancaster Assizes, 23rd March, 1784, for the murder of Edward Culshaw, at Prescott. The Editor is indebted to E. B. Dawson, Esq., J.P., chairman of the Visiting Justices, for the following extract from a book kept by the Governor of Lancaster Castle, and now among the registers of that prison:—"Assizes, March 23rd, 1784, John Toms . . . 18 years of age . . . convicted and executed March 29th, 1784. *N.B.*—A very extraordinary fact came out respecting the murder upon which Toms was convicted, viz., he had bought a ballad, and tore part of it off for a wad for the pistol. This wad was found in the deceased's head, which exactly corresponded with the part left in his pocket." The note ends as follows: "*Mem.*—This Assize lasted from March 23rd to April 3rd. It may be properly called the Black Assize, 19 being assigned for capital offences; 6 of them received sentence of death, and 3 were executed, viz., Toms, Heys, and Dugdale."

(*e*) *Reg. v. Courtnege and Mossingham*, see p. 223, *infra*.

which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havannah and Matanzas, who appeared to be the objects of the writer's malignant intentions. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters into the post-office on the evening of the 22nd, the explosion having occurred on the 24th; and there was found upon his person a seal which corresponded with the impression upon the letters, which circumstance (though there were other strong facts) was considered as conclusive of his guilt, and he was accordingly convicted and sentenced to two years' imprisonment (*f*). On a trial for the forgery of a document, the impression of a seal attached to it corresponded with another impression upon a packet of papers produced in evidence by the prisoner, and both impressions were taken from a seal in the possession of a member of his family (*g*).

The impressions of shoes, or of shoe-nails, or of other articles of apparel, or of patches, abrasions, or other peculiarities therein, discovered in the soil or clay, or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties (*h*). The presumption founded on these circumstances

(*f*) *Rex v. Palayo*, Liverpool Midsummer Quarter Sessions, 1836.

(*g*) *Rex v. Humphreys*, see pp. 198-201, *infra*.

(*h*) Menochius, De Præsumptionibus, lib. v. præ. 31; Mascardus, De Probationibus, Concl. Dcccxxxi.; Traité de la Preuve, par Mittermaier, c. 57.

has been appealed to by mankind in all ages, and in inquiries of every kind, and is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance. The following remarkable cases illustrate the weight of such mechanical facts, when connected with other concurring circumstances leading to the same result.

A farm labourer was tried for the murder of a young woman, a domestic servant living in the same service. A little before seven in the evening she went on an errand to take some barm to a neighbouring house, about 200 yards distant, but as it was not wanted, she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand, the prisoner followed her, carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found, lying on her back, drowned in a shallow pit near a footpath leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling; and chaff and grains of wheat were scattered about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive, of the

knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been in the interval before his arrival at the gardener's house in company with an acquaintance whom he had met with on the road; but it was proved that the person referred to, at the time in question, was at work thirty miles off. He was convicted and executed (i).

A man was tried at Stafford Summer Assizes, 1844, for the murder of an elderly woman, the housekeeper of an old gentleman at Wednesbury. The only inmates of the house were the old gentleman, a man-servant, and the deceased woman. Her master went from home on a Saturday morning, about half-past nine o'clock, as he was accustomed to do on that day of the week, leaving the deceased in the house alone. Upon his return, a quarter before two, he found her dead body in the brew-house, her throat having been cut and the house plundered. The murder had probably been committed about a quarter past ten o'clock, as the butcher called at that time and was unable to obtain admittance, and about the same time a scream was heard. Traces were found of a man's right and left footsteps leading from a stable in a small plantation

(i) *Rex v. Brindley*, Warwick Spring Assizes, 1816.

near the front of the house, from which any person leaving the house by the front door could be seen ; and similar footsteps were found at the back of the house leading from thence across a ploughed field for a considerable distance in a sequestered direction, until they reached a canal bank, where they were lost on the hard ground. From the distance between the steps at the back of the house and in the ploughed field, the person whose footsteps they were must have been running ; the impressions were those of right and left boots, and were very distinct, there having been snow and rain, and the ground being very moist. The right footprints had the mark of a tip round the heel ; and the left footprints had the impression of a patch fastened to the sole with nails different in size from those on the sole itself ; and altogether there were four different sorts of nails on the patch and soles, and in some places the nails were missing. Suspicion fell upon the prisoner, who had formerly lived as fellow-servant with the deceased, and who had been seen by several persons in the vicinity of the house a little before ten o'clock. Upon his apprehension on the following morning, his boots, trousers, shirt, and other garments were found to be stained with blood, and the trousers had been rubbed or scraped, as if to obliterate stains. The prisoner wore right and left boots, which were carefully compared with the footprints ; by making impressions of the soles in the soil about six inches from the original footmarks ; which exactly corresponded as to the patch, the tip, and the number, shape, sizes, and arrangement of the nails. The boots were then placed lightly upon the

original impressions, and here again the correspondence was exact. There could therefore be no doubt that the impressions of all these footsteps had been made by the prisoner's boots. He had been seen about a quarter before eleven on the morning of the murder with something bulky under his coat, near the place where the footsteps were lost on the hard ground, and proceeding thence towards the town of Wednesbury. At about eleven o'clock he called at the "Pack Horse" in that place, not far from the house, where he took something to drink and immediately left, and at a little after twelve he called at another public-house, which was also near the scene of the murder, where he stayed some time smoking and drinking. In the interval between the times when the prisoner had called at these public-houses, he was seen at some distance from them, near an old whimsey; and he was subsequently seen returning in the opposite direction towards Wednesbury. Five days afterwards, upon further search, the same footprints were discovered on a footpath leading in a direction from the "Pack Horse" towards the whimsey, where two bricks appeared to have been placed to stand upon, close to which was found an impression of a right foot corresponding with the impressions which had been before discovered; and in the flue was concealed a handkerchief in which were tied up a pair of trousers and waistcoat, part of the property stolen from the house. The prisoner must have availed himself of the interval between the times when he was seen at the two public-houses, to secrete the stolen garments in the whimsey, and thus to divest himself of the

bulky articles which had been observed under his coat on his arrival at the "Pack Horse." The jury, after deliberating several hours, returned a verdict of guilty, and he was executed pursuant to his sentence, having previously made a confession of his guilt (*k*).

A young man was tried at Taunton for the murder of a little girl. It was a murder of the kind known some years ago as of the "Jack the Ripper" order. The child was last seen going in the direction of her home. Her way was through a field, across which lay a footpath. On the further side of the field was a ditch, the soil being of clay. In this ditch her body was found, cruelly mutilated. About the time when the murder must have been committed, a man was seen in the ditch. From a variety of circumstances, suspicion fell upon the prisoner. Casts were taken of the footprints in the ditch and close to the child's body. They were not of the best; but the prisoner's boots had a few individual peculiarities, consisting chiefly of the absence of nails in one place or another from several of the rows on each boot. Careful measurements were made with a pair of compasses, and there was such a mass of correspondences between existing nails and absent nails in boots and footmarks, and such exact equality in the distances between nails which had been worn so as to present peculiarities and the places where nails were absent from both boots and casts, that it was impossible to believe that the correspondences

(*k*) *Reg. v. Beards*, coram Atcherley, Serjt.; and see other cases of this kind, *Rex v. Richardson*, see pp. 384-389, *infra*; *Rex v. Spiggott and others*, 4 Cel. Tr. 446.

were accidental. The prisoner was convicted and executed, having confessed his guilt (l).

In an American case, a prisoner charged with arson had turned his horse's shoes round after arriving at the house, so as to create the appearance of two persons having proceeded to and from it; but the artifice was the means of detection, since the removal of the shoes was indicated by the recent marks of nails on the horse's foot, and afforded one of the most emphatic of the indications by which the prisoner's guilt was established.

To guard against error, it is manifest that the recency of the discovery and comparison of the impressions, relatively to the time of the occurrence of the *corpus delicti*, and before other persons may have resorted to the spot, is of the highest importance. So, the accuracy of the comparison is obviously all-important, and therefore as a further means of guarding against mistake, it must be shown that the shoes were compared with the footmarks before they were put on them (m); and where the comparison had not been previously made, Mr. Justice Parke desired the jury to reject the whole inquiry relating to the identification by shoe-marks (n). Nor must it be overlooked, that, even where the

(l) *Reg. v. Reyland*, Taunton Winter Assizes, February 20th, 1889, *coram* Wills, J.

(m) *Rex v. Heaton*, cited in *Rex v. Shaw*, 1 Lewin, C. C. 116.

(n) *Rex v. Shaw*, *ibid.* The boots or shoes never ought to be put into the footprints at all. The impressions for comparison should be made by the side and at a sufficient distance from those in question. Where the character of the soil and the interval of time permit such a

identity of footmarks has been established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party (*o*); and that in other respects this kind of evidence may lead to erroneous interpretation and inference (*p*).

The identification of human remains is attended with peculiar difficulties consequent upon the changes produced by death, which will be considered in a subsequent part of this essay.

## SECTION 2.

### IDENTIFICATION OF ARTICLES OF PROPERTY.

THE identification of articles of property, like that of the human person, is capable of being established, not only by direct evidence, but by means of numberless circumstances which it is not possible to enumerate. Most of the cases of identification which have been mentioned in the preceding Section, are in fact cases of identification of articles of property, applied inferentially to the establishment of personal identity, and sufficiently illustrate the difficulties which attend investigations of this kind. The following cases, as well as others which have been

thing, the most satisfactory mode of proof is dig out and preserve the original footprints; where that cannot be done, casts in plaster of Paris should be taken. Where neither of these methods are adopted and the identification is sought to be established merely by the police evidence, juries are apt to pay very little attention to it.

(*o*) See the remarkable case of *François Mayenc*, Gabriel, 403.

(*p*) *Rex v. Thornton*, see pp. 244—249, *infra*; *Rex v. Isaac Looker*, see pp. 242—244, *infra*.

already mentioned, illustrate the liability to error and misconception, of even well-intentioned witnesses who speak to facts of this kind.

At the Spring Assizes, at Bury St. Edmunds, 1830, a respectable farmer, occupying twelve hundred acres of land, was tried for a burglary and stealing a variety of articles. Amongst the articles alleged to have been stolen were a pair of sheets and a cask, which were found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark "P. C. 84." enclosed in a circle at one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman in Norwich, whose casks were all marked "P. C. 84." enclosed in a circle, precisely as the prisoner's were, the letters P. C. being the initials of his name, and that the cask in question was one of them. In summing up, the learned judge remarked, that this was one of the most extraordinary cases ever tried, and that it certainly

appeared that the witnesses for the prosecution were mistaken. The prisoner was acquitted (*q*).

A man was tried in Scotland for housebreaking and theft. The girl whose chest had been broken open, and whose clothes had been carried off, swore to the only article found in the prisoner's possession and produced, namely, a white gown, as being her property. She had previously described the colour, quality and fashion of the gown, and they all seemed to correspond with the article produced. The housebreaking being clearly proved, and the goods, as it was thought, clearly traced, the case was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. To the surprise of every one present, it turned out that the gown which the girl had sworn to as belonging to her—which corresponded with her description, and which she said she had worn only a short time before—would not fit her person. She then examined it more minutely, and at length said it was not her gown, though almost in every respect resembling it. The prisoner was, of course, acquitted; and it turned out the gown produced belonged to another woman, whose house had been broken into about the same period, by the same person, but of which no evidence had at that time been produced (*r*).

On the trial of a young woman for child-murder, it appeared that the body of a newly-born female

(*q*) See Ann. Reg., 1830 (Chr.), p. 50.

(*r*) *Rex v. Webster*, Burnett on the Criminal Law of Scotland, p. 558; 19 St. Tr. col. 494 (note).

child was found in a pond about a hundred yards from her master's house, dressed in a shirt and cap, and a female witness deposed that the stay or tie which was pinned to the cap, and made of spotted linen, was made of the same stuff as a cap found in the prisoner's box ; but a mercer declared that the two pieces were not only unlike in pattern, but different in quality (s).

A youth was convicted of stealing a pocket-book containing five one-pound notes, under very extraordinary circumstances. The prosecutrix left home to go to market in a neighbouring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which on rising up she found to be the prisoner's. Having afterwards purchased some articles at a grocer's shop, on searching for her pocket-book in order to pay for them, she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which she identified by a particular mark, as that which she had lost, but it contained no money. Several witnesses deposed that the prisoner had long possessed the identical pocket-book, speaking also to particular marks by which they were enabled to identify it ; but some discrepancies in their evidence having led to the suspicion that the defence was a fabricated one, the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the

(s) *Rex v. Bate*, Warwick Autumn Assizes, 1809, before Le Blanc, J.

continuance of the Assizes, two men who were mowing a field of oats through which the path lay by which the prosecutrix had gone to market, found in the oats close to the path a black pocket-book containing five one-pound notes. The men took the notes and pocket-book to the prosecutrix, who immediately recognized them; and the committing magistrate despatched a messenger with the articles found, and her affidavit of identity to the judge at the assize town, who directed the prisoner to be placed at the bar, publicly stated the circumstances so singularly brought to light, and directed his immediate discharge. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her handkerchief, and had clearly been mistaken as to the identity of the pocket-book produced upon the trial(*l*).

It is not, however, necessary that the identity of stolen property should be invariably established by positive evidence. In many such cases identification is impracticable; and yet the circumstances may render it impossible to doubt the identity of the property, or to account for the possession of it by the party accused upon any reasonable hypothesis consistent with his innocence; as in the case of labourers employed in docks, warehouses, or other such establishments, found in possession of tea, sugar, tobacco, pepper, or other like articles, concealed about the person, in which cases the similarity or general resemblance of the article stolen is

(*l*) *Rex v. Gould*, Stafford Summer Assizes, 1820, *coram* Garrow, B.

sufficient (*u*). Two men were convicted of stealing a quantity of soap from a soap manufactory near Glasgow, which was broken into on a Saturday night by boring a hole in the wall, and 120 lbs. of yellow soap abstracted. On the same night, at eleven o'clock, the prisoners were met by a watchman near the centre of the city, one of them having 40 lbs. of yellow soap on his back, and the other with his clothes greased all over with the same substance. The prisoners, on seeing the watchman, attempted to escape, but were seized. The owner declared that the soap was exactly of the same kind, size, and shape, with that abstracted from his manufactory; but as it had no private mark, he could not identify it more distinctly. One of the prisoners had formerly been a servant about the premises, and both of them alleged that they got the soap in a public-house from a man whom they did not know (*x*). A servant man was seen to come from a part of his master's premises where he had no right to go, and where a large quantity of pepper was stored in bulk, and on being stopped, a quantity of pepper of the same kind was found on his person: it was held by the Court for the Consideration of Crown Cases Reserved that though the pepper could not be positively identified, he had been properly convicted of larceny (*y*).

(*u*) 2 East, P. C. 657; 2 Russell on Crimes, 6th ed., p. 294; *Rex v. White*, R. & R. 508; *Reg. v. Dredge*, 1 Cox, C. C. 235.

(*x*) *Rex v. McKechnie and Tolmie*, Glasgow Spring Circuit, 1828, Alison's Principles of the Criminal Law of Scotland, vol. i., p. 322. Cf. p. 80, *supra*.

(*y*) *Rex v. Burton*, 23 L. J. M. C. 52; 6 Cox, C. C. 293; and see *Reg. v. Hooper*, 1 F. & F. 85.

## SECTION 3.

## PROOF OF HANDWRITING

STRICTLY speaking, the only evidence of handwriting which is entitled to be called direct, is the evidence of a witness who proves that he himself wrote or signed the document in question, or that of a witness who proves that he saw the document written or signed. All other evidence of handwriting must rest in greater or less degree upon inferences drawn from the appearance of the writing in question or other circumstances.

Where such direct testimony is not available, the best and usual mode of proving handwriting is, by the direct testimony of some witness who has either seen the party write, or acquired a knowledge of his handwriting from having corresponded with him, and had transactions in business with him on the faith that letters purporting to have been written or signed by him were genuine. In either case, the witness is supposed to have received into his mind an exemplar of the general character of the handwriting of the party, and he is called on to speak to the writing in question by reference to the standard so formed in his mind (z).

In cases where evidence of the kinds above

(z) *Per* Coleridge, J., in *Doe d. Mudd v. Suckermore*, 5 A. & E., at p. 705, and 2 N. & P. 16.

described was lacking or required corroboration, the question arose whether it was admissible for the Court or jury to judge of the genuineness of a writing in dispute from its likeness or unlikeness to other writings, the genuineness of which was capable of proof in other ways, and whether witnesses might be called for the purpose of proving the effect of such comparison.

The following may be taken as a fair statement of juridical opinion and practice upon this subject prior to the legislative change introduced in the year 1854.

Evidence of similitude of handwriting by the comparison of controverted writing with the admitted or proved writing of the party, made by a witness who had never seen the party write, nor had any knowledge of his handwriting, and who arrived at the inference that it was his handwriting because it was like some other which was his (*a*), was a mode of proof much lauded by writers on the civil law, and was commonly admitted in those countries whose jurisprudence is founded on that system; the comparison being made by professional *experts* appointed by the Court or agreed upon by the parties, under many restrictions for securing the genuineness of the writings which are to form the standard of comparison. Comparison of handwriting appears also to have been a recognized mode of proof in some of the American States,

(*a*) Bentham's *Rationale of Judicial Evidence*, book vii., c. 3; *Rex v. De la Motte*, 21 St. Tr. col. 810.

whose judicial systems are generally founded on our own (*b*). Such evidence was in general inadmissible in this country, though the leaning of text-writers of authority appears to have been rather in favour of the principle of its admissibility ; the only admitted exceptions being, where the writing acknowledged to be genuine was already in evidence in the cause, or the disputed writing was an ancient writing (*c*). In these excepted cases, the evidence was admitted, it was said, of necessity—in the former case because it was not possible to prevent the jury from making such comparison, and therefore it was best, as was remarked by Lord Denman (*d*), for the Court to enter with the jury into that inquiry, and do the best it could under circumstances which could not be helped;—in the latter, because from the lapse of time no living person could have any knowledge of the handwriting from his own observation (*e*), and because in ancient documents it often became a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches (*f*).

(*b*) See in Bemis's Report of the Trial of *Professor Webster*, some curious evidence of this kind ; see p. 109, *supra*.

(*c*) *Allport v. Meek*, 4 C. & P. 267 ; *Bromage v. Rice*, 7 *ibid.* 548 ; *Waddington v. Cousins*, *ibid.* 595 ; *Griffith v. Williams*, 1 C. & J. 47 ; *Doe d. Perry v. Newton*, 1 N. & P. 1 ; and 5 A. & E. 514 ; *Solita v. Yarrow*, 1 M. & R. 133 ; *Griffits v. Ivery*, 11 A. & E. 322 ; *The Fitzwalter Peerage*, 10 C. & F. 193 ; *Doe d. Jenkins v. Davies*, 10 Q. B. 314 ; 16 L. J. Q. B. 218 ; and see *Reg. v. Taylor*, 6 Cox, C. C. 58.

(*d*) In *Doe d. Perry v. Newton*, 1 N. & P. 1.

(*e*) *Per* Patteson, J., in *Doe d. Mudd v. Suckermore*, 5 A. & E. 703, at p. 736.

(*f*) *Per* Coleridge, J., *ibid.*, at p. 718.

The evidence of persons accustomed to the critical examination of handwriting, as engravers and inspectors of franks, who, without any previous knowledge of a person's handwriting, have professed to be able to determine by comparison of the disputed with the genuine writing, whether a signature be genuine or not, and also from the general character and appearance of writing, whether it is written in a natural or feigned hand, was formerly considered another exception to the rule (*g*); but it came to be thought of so little weight, and attempts to introduce it were so much discountenanced, that, in the language of Lord Denman (*h*), this chapter might be considered as expunged from the book of evidence. It was remarked of evidence of this nature, that besides being subject to the same defects as the opinions of persons speaking from previous familiar knowledge, it arose from a forced acquaintance with the handwriting of a few, often selected, specimens, while the examination was made solely with a view to giving evidence in favour of the party to whom the witness looks for remuneration (*i*); so that, in the words of an eminent Scotch judge, "in almost all countries, the evidence of persons of skill on this subject is almost totally abandoned" (*k*).

(*g*) *Goodtitle v. Revett*, 4 T. R. 497; *Rex v. Cator*, 4 Esp. 117; *Rex v. Johnson*, 29 St. Tr. 81.

(*h*) *Doe d. Mudd v. Suckermore*, 5 A. & E., at p. 751; and see *Gurney v. Langlands*, 5 B. & Ald. 330; *Constable v. Steibel*, 1 Hagg. 56; *Young v. Brown*, *ibid.* 569; *The Fitzwalter Peerage*, 10 C. & F. 193; *The Tracy Peerage*, *ibid.* 154.

(*i*) *Dickson's Law of Evidence in Scotland*, vol. i., s. 925, p. 477.

(*k*) *Per Lord Mackenzie, ibid.*, note (*u*).

An attempt was made in the year 1836, in the leading case of *Doe v. Suckermore*, to introduce expert evidence by comparison of handwritings. The question in the cause was the due execution of a will. On the first day of the trial the defendant called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an Ecclesiastical Court, and several other signatures were shown to him (none of them being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was a bank-inspector, who had no knowledge of the handwriting of the supposed attesting witness, except from having previous to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court. Mr. Justice Vaughan rejected the evidence; and upon a motion for a new trial on the ground of its improper rejection, the judges of the Court of Queen's Bench were equally divided in opinion (*l*).

Thus stood the law down to 1854, when the Common Law Procedure Act of that year (*m*) enacted that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall in civil cases be permitted to

(*l*) 5 A. & E. 703; and see *Hughes v. Rogers*, 8 M. & W. 123; *Young v. Horner*, 2 M. & R. 536; 1 C. & K. 51.

(*m*) 17 & 18 Vict. c. 125, s. 27.

be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

A few years later a section in precisely the same terms was incorporated into the Criminal Evidence Act, 1865 (*n*), so that the anomaly of a difference between the rules governing the admissibility of such evidence in civil and criminal cases no longer exists.

Evidence as to handwriting is subject to many sources of fallacy and error, among which may be enumerated tuition by the same preceptor, employment with other persons in the same place of business, as well as designed imitation or disguise, all of which are frequently causes of great similarity in writing. Men in certain businesses or professions sometimes adopt peculiarities of character, though less frequently than formerly ; and there are characteristic peculiarities indicative of age, infirmity, and sex (*o*).

Handwriting is sometimes most successfully imitated. On a trial for forgery of bank-notes, a banker's clerk whose name was on one of the notes swore distinctly that it was his handwriting, although as a matter of fact it was forged, while he spoke hesitatingly with respect to his genuine subscription (*p*). A solicitor named Shaw was tried at Derby, in 1861

(*n*) 28 & 29 Vict. c. 18, s. 8.

(*o*) See *Rex v. Johnson*, 29 St. Tr., at col. 475.

(*p*) *Rex v. Carsewell*, Burnett's Criminal Law of Scotland, 502.

or 1862, on a number of indictments for forgery. One of them related to a deed which purported to be executed by a client of his named Abel. Abel had executed a genuine mortgage, and the solicitor had forged another in his name. The client, Abel, swore to the forgery as his genuine signature, and swore that the genuine signature was not his. He gave this evidence before the magistrate and the grand jury. But he had made a mistake, and in an action, tried likewise at Derby, on the forged deed, it was conclusively established by the evidence of the convict, corroborated by a variety of circumstances, that he had sworn to the wrong deed as his own (*q*). Lord Eldon mentioned a very remarkable instance of the uncertainty of this kind of evidence. A deed was produced at a trial on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon declared that he had never attested a deed in his life (*r*).

Sometimes, on the contrary, a very small matter is conclusive as to the genuineness or otherwise of

(*q*) *Painter v. Abel*, *coram* Erle, C. J., Derby Summer Assizes, 1862, 2 H. & C. 113; 33 L. J. Exch. 60. In the latter report it is erroneously stated that the convict was not called. The Editor perfectly well remembers his appearance in the witness-box, and in convict clothes, and the contrast he presented to the over-dressed man who had appeared with something of a swagger in the dock a few months before.

(*r*) *Eagleton v. Kingston*, 8 Ves., at p. 476.

documents of disputed origin. In *Cresswell v. Jackson* (s), certain codicils, an interlineation in a will and part of an epitome of the will and the first codicil were successfully shown to be forgeries. It turned out that the method of crossing the letter *t* in the word "to" was an absolute key to the handwritings of the testator and the forger—and similarly, in *Howe v. Ashton* (t), the method of making the upper part of the figure 7 was conclusively shown to be a crucial test as to whether the incriminated document was genuine or not.

In a case in Doctors' Commons the learned judge repudiated the common objection of painting or touching, as a reason for inferring fraud, saying that there could scarcely be a less certain criterion, and peremptorily declined the use of a glass of high powers, said to have been used by the professional witnesses, observing, in substance, that glasses of high power, however fitly applied to the inspection of *natural* subjects, rather tend to distort and misrepresent than to place subjects of the kind in question in their *true* light; especially when used (their ordinary application in the hands of prejudiced persons) to confirm some theory or preconceived opinion (u). But it is the daily practice of Courts of Common Law to admit the artificial aid of glasses and lamps; and on an indictment for forgery, the question being whether a paper had originally contained certain pencil marks which were alleged to have been rubbed out, and ink-writings written in their stead, the opinion

(s) See p. 402, *infra*.

(t) See p. 413, *infra*.

(u) *Robson v. Roche*, 2 Addams, 53, at pp. 85, 88 (a), 89.

of an engraver, who had examined the document with a mirror, was held to be receivable (x).

The distrust of magnifying glasses above alluded to was perhaps natural a century ago, seeing what they were. A glass of high power and with a narrow area of undistorted vision may very well still convey an erroneous impression to the observer. But with such excellent instruments as are readily at command at the present day the old-fashioned distrust has disappeared, and such aids to the eyesight are of the utmost value. Enlarged photographs are often of great use, not only to show the patching and painting which sometimes accompanies a forgery, but also to indicate diversities of ink or half-erased pencil marks: such variations depending upon differences in the chemical composition of the substances remaining upon the paper which affect the actinic effect of the rays reflected from them. Effective use was made of enlarged photographs in investigating the Piggott forgeries, and an elaborate series of them prepared for use before the Parnell Commission was once shown to the Editor. They were conclusive, but were not used in Court as the case for the forgeries broke down upon the cross-examination of Piggott.

The following extract from a learned judgment of Sir John Nicholl embodies many instructive observations upon this kind of evidence: "This Court has often had occasion to observe, that evidence to handwriting is at best, in its own nature,

(x) *Reg. v. Williams*, 8 C. & P. 434.

very inconclusive; affirmative, from the exactness with which handwriting may be imitated; and negative, from the dissimilarity which is often discoverable in the handwriting of the same person under different circumstances. Without knowing very precisely the state and condition of the writer at the time, and exercising a very discriminating judgment upon these, persons deposing, especially, to a mere *signature* not being that of such or such a person from its dissimilarity—howsoever ascertained or supposed to be—to his usual handwriting, are so likely to err, that negative evidence to a mere subscription, or signature, can seldom, if ever, under ordinary circumstances, avail in proof against the final authenticity of the instrument to which that subscription or signature is attached. But such evidence is peculiarly fallacious where the dissimilarity relied upon is not that of general character, but merely of particular letters; for the slightest peculiarities of circumstance or position—as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined—nay, the materials, as pen, ink, etc., being different at different times—are amply sufficient to account for the same *letters* being made variously at the different times by the same individual. Independently however of anything of this sort, few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person” (y).

(y) *Robson v. Locke*, 2 Addams, at p. 79.

The difficulty of proving handwriting is greatly increased where it is studiously disguised ; but such is the power of habit, that though persons may succeed to a certain extent in disguising their writing, they commonly fall into their natural manner and characteristic peculiarities of writing (*z*) ; such peculiarities being most commonly manifested in the formation of particular letters, or in the mode of spelling particular words.

A tailor, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion ; and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a mass of similar productions, which, it was said, clearly proved his connection with the family of the deceased, and the Lord Ordinary decided the cause in his favour ; the case however was carried to the Inner House. When it came into Court, certain circumstances led Lord Meadowbank, then a young man at the bar, to doubt the authenticity of the documents. One circumstance was, that there were a number of words in the letters, purporting to be from different

(*z*) *Per* Macdonald, L. C. B., in *Rex v. Bingham*, Horsham Spring Assizes, 1811, Shorthand Report, 106 ; *Howe v. Ashton*, p. 413, *infra* ; *Cresswell v. Jackson*, p. 402, *infra*, and see p. 191, *supra*. The latter case presented a curious instance of characteristic spelling. The person alleged to be the writer of the incriminated documents (with only one discovered exception) invariably spelled "daughter" "*doughter*," a phonetic way of spelling the word after the pronunciation common in the district. The testator never made this mistake.

individuals, spelt, or rather misspelt, in the same way, and some of them so peculiar, that on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table, and was examined in the presence of the Court. He was desired to write to the dictation of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters in precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and this result was arrived at in the teeth of the testimony of half-a-dozen engravers, all of whom said that they thought the letters were written by different hands (*a*).

It is even more difficult to depose with confidence to the identity of a disguised writing, if the disguise is applied to printed characters, and Mr. Baron Rolfe spoke of such evidence as of no value (*b*).

#### SECTION 4.

##### VERIFICATION OF DATES AND TIME.

AMONGST the numerous physical and mechanical circumstances which occasionally lead to the detection of forgery and fraud, a discrepancy between the

(*a*) Related by Lord Meadowbank himself, in the course of his charge to the jury, in *Reg. v. Humphreys*, see pp. 198-201, *infra*; Swinton's Report at p. 350; and see Shorthand Report of the case of *Smith v. Earl Ferrers*, 1846.

(*b*) *Reg. v. Rush*, Norwich Spring Assizes, 1849; *Professor Webster's case*, Bemis's Report, see p. 109, *supra*.

date of a writing and the *anno Domini* water-mark in the fabric of the paper is one of the most striking; but inasmuch as prospective issues of paper, bearing the water-mark of a succeeding year, are occasionally made, this circumstance is not always a safe ground of presumption (*c*); and it is not uncommon among manufacturers both to post-date and to ante-date their paper-moulds. A witness examined in 1834 stated that he was then making moulds with the date of 1828, under a special order (*d*). In an old case a criminal design was detected by the circumstance that a letter, purporting to come from Venice, was written upon paper made in England (*e*).

In one case, in which an action was brought upon a forged cheque alleged to have been given to the plaintiff by a deceased person, the plaintiff, in order to account for the possession of a sum of £200 which he said he had lent to the deceased man, stated that he had borrowed that sum from his mother-in-law, to whom he had given a promissory note, which he produced, having, as he said, obtained it from her for the purposes of the trial. There was a hole through the year mark on the stamp, which he said was caused by his mother-in-law having put it on a file. The note was dated in 1889. The date-mark should have been "89." Just enough remained of the first figure to suggest to the judge that the

(*c*) A Commissioner of the Insolvent Debtors' Court sitting at Wakefield in 1836, discovered that the paper he was then using, which had been issued by the Government stationer, bore the water-mark of 1837.

(*d*) *Rodger v. Kay*, 12 Cases in Court of Session, 317; *Miller v. Fraser*, 4 *ib.* 551; 4 Murray's Cases in Jury Court, at p. 118.

(*e*) Sir Francis Moore's Rep. 817.

curve did not look like the sharp curve of half of an "8," and, upon very careful manipulation of the back of the note with a fine instrument, very nearly the whole of the year-mark "90" was replaced and made distinctly visible. Evidence from the Stamp Office showed that stamps were never issued post-dated (*f*).

The critical examination of the internal contents of written instruments, perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by peculiarities of writing or orthography characteristic of a different age or period, or by the employment of words of later introduction, or by the use of them in a sense or meaning which they did not then bear, or by some statement or allusion not in harmony with the known character, opinions, and feelings of the pretended writer, or with events or circumstances which must have been known to him, or by a reference to facts, or modes of thought characteristic of a later or a different age from that to which the writing relates. A writer, eminent alike for his critical sagacity and for his imaginative genius, declared that he had met in his researches with only one poem which, if it had been produced as ancient, could not have been detected on internal

(*f*) *Howe v. Burchardt and another*, Middlesex Hilary Sittings, 1891, *coram* Wills, J. ; see pp. 413-414, *infra*.

evidence (*g*). Judicial history presents innumerable examples in illustration of the soundness of these principles of judgment, of which the following are not the least interesting.

A deed was offered in evidence, bearing date the 13th of November in the second and third years of the reign of Philip and Mary, in which they were called "*king and queen of Spain and both Sicilies, and dukes of Burgundy, Milan, and Brabant,*" whereas at that time they were formally styled "*princes of Spain and Sicily,*" and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the two Sicilies until Trinity Term following (*h*).

A most curious and instructive case of this kind was that of Alexander Humphreys, before the High Court of Justiciary at Edinburgh, April, 1839, for forging and uttering several documents in support of a claim advanced by him to the earldom of Stirling and extensive estates. One of those documents purported to be an excerpt from a charter of Novodamus of King Charles I., bearing date the 7th of December, 1639, in favour of William the first Earl of Stirling, and making the honours and estates of that nobleman, which under previous grants were inheritable only by heirs *male*, descendible in default of heirs male to his eldest heirs female, without division, of the last of such heirs male, and to the heirs male of the body

(*g*) 2 Lockhart's Life of Scott, c. ix.

(*h*) *Mossom v. Izy*, 10 St. Tr. 555, at col. 616; and see Co. Litt. 7*b*.

of such heirs female respectively. This excerpt purported in the *testatum* clause to be witnessed by Archbishop Spottiswood "our chancellor," whereas he died on the 26th of November, 1639, and it was proved by the register of the Privy Council that he resigned the office of Chancellor, and that the Great Seal was delivered to the custody of James, Marquess of Hamilton, on the 13th of November, 1638, more than a year before the date of the pretended charter, and that there was an interregnum in the office of Chancellor until the appointment of Lord Loudon on the 30th of September, 1641. A genuine charter, dated four days after the pretended charter, was witnessed by James, Marquess of Hamilton. The circumstance was significant, that in the catalogue of the Scottish chancellors, appended to Spottiswood's History and other works, no mention is made of the interval between the resignation of the Archbishop of St. Andrew's and the appointment of the Earl of Loudon. In the margin of the excerpt was a reference to the register of the Great Seal Book 57, in the following form, "Reg. Mag. Sig. lib. 57;" but it was proved that this mode of marking and reference did not commence until 1806, when the registers were rebound, in order that they should have one title; and that previously to that time the title of those documents was, "Charters, book i., book ii.," and so on. In the supposed excerpt the son of the first earl was styled "*nostro consanguineo*," a mode of address never adopted in old charters in regard to a commoner; and there were other internal incongruities. This document consisted of several leaves

stitched together, which were of a brown colour—as well under the stitching as where open ; whereas if the stitching had been old, the part of the paper not exposed to the atmosphere would have been whiter than the rest. Around the margin of this excerpt were drawn red lines ; but it was proved by official persons familiar with the extracts of the period, that such lines were not introduced into the Chancery Office till about 1780. A series of anachronisms conclusively disproved the authenticity of several other documents adduced by the prisoner in support of his claim. One of those documents was a copper-plate map of Canada by Guillaume de l'Isle, “*Premier Géographe du Roi, avec privilège pour vingt ans,*” bearing the date of 1703 ; on the back of which, amongst other supposed attestations, were a note purporting to be in the handwriting of Flechier, Bishop of Nismes, dated the 3rd of June, 1707, and another note purporting to be in the handwriting of Fénelon, Archbishop of Cambray, of the date of the 16th of October, 1707. It was proved that De l'Isle was not appointed geographer to the king until the 24th of August, 1718. In all of De l'Isle's editions of his map the original date of 1703 was preserved as the commencement of his copyright, but on any change of residence or of designation, he made a corresponding change in the original copper-plate from which all successive issues of the map were engraved, and it was proved by a scientific witness that the title of De l'Isle had been actually altered on the copper-plate of the map since 1718. It was also proved that Flechier died in 1711 (the letters-patent for the installation of his successor in the

bishopric of Nismes being produced, bearing date the 26th of February in that year), and that Fénelon died on the 7th of January, 1715. Of course a map issued prior to 1718 could not refer to his appointment of geographer to the king, and any attestation of the date of 1707, or by a person who died before 1718, to a map containing a recognition of that appointment must of necessity be spurious. The forger of the map must have been ignorant of the fact that De l'Isle was not appointed geographer to the king until 1718, and misled by the date of 1703 upon his maps; so difficult is it to preserve consistency in an attempt to impose by means of forgery. The very ink with which some of the pretended attestations were made was not the usual ink of the period, but a modern composition made to imitate ink turned old. There were other strong grounds for impugning the genuineness of these various documents, which the jury unanimously found to be forged (*i*).

It was observed by Lord Chief Baron Macdonald, that there is nothing of which we are so little in the habit as measuring with any degree of correctness small portions of time; and that if anyone were to examine with a watch which marks the seconds, how much longer a space of time a few seconds or a few minutes really are than people in general conceive them to be, they would be surprised; but that in general, when we speak of a minute, or an instant,

(*i*) See Report of the Trial of the claimant of the Stirling Peerage, by Archibald Swinton; another report by William Turnbull; Remarks on the Trial, by an English Lawyer; 1 Townsend's Modern State Trials, 403; and Dickson's Law of Evidence in Scotland, vol. i. § 289, p. 172.

we can hardly be understood to mean more than that it was a very short space of time (*k*). Nevertheless it is sometimes of the highest importance accurately to fix the exact time of the occurrence of an event, and a difference of even a few minutes may be of vital moment. This frequently happens in cases where the defence is that of an *alibi*. On a charge of murder, where the defence was of that nature, and it was essential to fix the precise times at which the prisoner had been seen by the several witnesses soon after the fatal event which was the subject of investigation, the object was satisfactorily effected by a comparison made by an intelligent witness on the same day, of the various timepieces referred to by the several witnesses, with a public clock; thus affording the means of reducing the times as spoken to by them to a common standard (*l*). Post-office marks are often of great importance in fixing disputed dates; but the defective manner in which they are impressed frequently renders them useless, and this has been from time to time the subject of judicial animadversion (*m*).

Scientific testimony grounded on the state of wounds and injuries to the human body, or on its condition of decay, is frequently employed indirectly in the solution of questions of time; but cases of this nature belong to the department of medical jurisprudence.

(*k*) *Rex v. Patch*, Gurney's Report, 171; see pp. 390-395, *infra*.

(*l*) *Rex v. Thornton*, see pp. 244-249, *infra*.

(*m*) By Lord Campbell, L. C. J., in *Reg. v. Palmer*, see pp. 344-351, *infra*; and by the Lord Justice Clerk in *Reg. v. Madeleine Smith*, see pp. 300-310, *infra*.

## AMERICAN NOTES.

[NOTE TO CHAPTER IV.]

### *Identification of Person.*

“ [Facts] which establish the identity of any thing or person whose identity is in issue or is or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.” Stephen’s Dig. Evid., Art. 9.

### *Personal Peculiarities.*

Where it is shown that a blow must have been given with the left hand, it may be shown that the defendant is left-handed. *Com. v. Sturtivant*, 117 Mass. 131.

Of the methods of identification Hubback, in his *Evidence of Succession*, 48 Law Library, star p. 448, writes: “On the features, the most obvious and peculiar of physical characteristics, Lord Mansfield has observed, that the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men, every one may be known from another. Cases of persons undistinguishable from each other by this test have, nevertheless, occasionally occurred. . . . Those who have considered this subject attach less importance to the features, which are often found to undergo great alteration, than to peculiar marks, such as *naevi*, cicatrices, fractures, and natural deformities. Sometimes marks which have been effaced may be brought out by proper means. A criminal

who had escaped from prison, after being branded, and apparently destroyed the mark by causing an eruption over the whole surface, but he was long afterwards identified by Foderé, who applied a gold plate of metal, which made the other parts pale, whilst the fatal letters appeared in distinct relief."

*Personal Appearance.*

Upon the issue of identity the appearance of a person two years before, and after the date in question, is competent. *Com. v. Campbell*, 155 Mass. 537.

On questions of identity, the memory of personal appearance fifty years back is too unreliable to be considered. *Sperry v. Tebbs*, 20 Weekly Law Bulletin, 181.

It is no identifying evidence that witnesses met a man in the street several miles away from the scene of an arson, who was about the size and height of the defendant. *People v. Gotshall* (Mich.), 82 N. W. 274.

Evidence of identification is admissible even though it be not positive. In *Com. v. Kennedy*, 170 Mass. 18, where the defendant was charged with an attempt to poison another by sticking some arsenic under the crossbar of the prosecuting witness's moustache cup, the following testimony was allowed: "An apothecary testified that he sold a box of 'Rough on Rats' the day before the cup was found, and, subject to examination, was allowed to testify that, to the best of his knowledge, belief, and recollection, he sold it to the defendant. The identity of a third person always is a matter of inference and opinion."

Where criminal intercourse with a girl under a certain age is charged, it is proper to consider her appearance as indicating her age. *Jones v. State*, 106 Ga. 365; *Com. v. Hollis*, 170 Mass. 433; *People v. Elco*, 113 Mich. 519.

A witness or a party may be required to stand up to be identified. *Rice v. Rice*, 47 N. J. Eq. 559.

Where one is asked who did a certain thing, an answer "that man" (pointing to the defendant) is proper. *Com. v. Whitman*, 121 Mass. 361.

The State may bring in the defendant's partner in the crime and identify him as having been with the defendant. *State v. Gartrell*, 171 Mo. 489.

*Photographs Used to Identify.*

Photographs and portraits are admissible to prove identity. *Ulderzook v. Com.*, 76 Pa. 340; *Com. v. Connors*, 156 Pa. 147; *Bryant's Estate*, 176 Pa. 309.

*Bastardy — Identification of Father.*

To show resemblance of a child to its putative father, the child may be exhibited to the jury for their judgment. *Crow v. Jordon*, 49 Ohio St. 655; *Gaunt v. State*, 50 N. J. L. 490; *Jones v. Jones*, 45 Md. 144.

*Identification by Voice.*

Voice used as a mark of identification. *State v. Shinborn*, 46 N. H. 502; *Com. v. Williams*, 105 Mass. 67.

Identification by voice only, when witness heard defendant speak only twice at a distance of seventy-five yards and amid the barking of dogs, is not sufficient. *Patton v. State*, 117 Ga. 230.

"Jeremiah Dowsing deposed, that some day or two after the murder, heard some one at Noxubee turnpike, about two o'clock at night, calling out; from the voice, thinks it was McCann; did not see him; had known him before." *McCann v. State*, 13 Smedes & M. (Miss.) 471, 480.

A witness who has heard the defendant talk but once may testify as to identification by the voice, but the jury may be instructed not to convict upon that evidence alone. *Com. v. Williams*, 105 Mass. 62; *Com. v. Hayes*, 138 Mass. 185.

Where there is testimony as to identification by voice, the accused, not being a witness, may not repeat something to the jury in rebuttal. *Com. v. Scott*, 123 Mass. 222. See also *Johnson v. Com.* 115 Pa. 369.

*Wounds on Defendant's Person.*

Where the defendant was accused of robbing and the prosecuting witness testified that he had bitten his assailant on the left leg, it was allowed to be shown that the defendant had certain bruises on his left leg that might have been made by human teeth. *State v. Jones*, 153 Mo. 457.

Where the deceased's body was found in a ditch, testimony is competent to show that the defendant was seen coming out of

that ditch with blood on his coat and a new scratch on his face. *Davis v. State*, 126 Ala. 44.

Where the defendant is charged with rape, to corroborate the identification by the prosecutrix, it may be shown that the accused had scratches on his face the day after the crime and that he had none the day before. *State v. Fleming*, 130 N. C. 688.

A conviction would be sustained where it is shown that the defendant and the deceased had gone together to the spot where the deceased was found with her throat cut, and the defendant's finger appears to have been bitten and his coat is torn. *Jones v. State*, 29 Tex. App. 338.

Where burglars had been frightened away by firing a shotgun at them, it was shown that one of the defendants was treated that night for gunshot wounds in the face, the defendants were shown to have had a horse and buggy that night, and there was one at the scene of the crime, and the owner swore he recognized the voice of another. *State v. Wines* (N. J.), 46 Atl. 702.

*Identification by Appearance and Condition of Clothing.*

Where the defendants were charged with a crime, and the State showed that it was raining at the time and place of the crime, and that clothing belonging to the defendants was found hanging in their barn wet, while other articles were dry, the defendants may prove that the barn leaked, and the State may show in rebuttal that the barn did not leak until long after the date of the crime. *Kastner v. State* (Neb.), 79 N. W. 713.

Where the defendant, charged with murder, claimed to have been elsewhere and to have just returned home on the cars, it was shown that a man had been seen to ride away on a mule from the scene of the crime, and when the defendant was arrested at his home thirty miles from that place his trousers had hair on them like that of the mule, and the mule was found near by much exhausted. This identified him as the man seen, and with other evidence was sufficient to convict. *Chapman v. State*, 34 Tex. Cr. R. 27.

Defendant was identified as a chicken thief by tracks in the snow, feathers on his coat, and attempting to sell the stolen property. *People v. Lyons*, 51 N. Y. Supp. 811.

There was mud on the defendant's clothes like that in a cellar on a lot adjoining the burglarized house where stolen articles

were concealed, but the defendant showed that such mud was common on all the streets. *People v. Cronk*, 58 N. Y. Supp. 13.

It may be shown that the clothing of one accused of arson smelled of kerosene and that the fire had been started with kerosene. *People v. Bishop*, 134 Cal. 682.

Where one is accused of setting a fire with kerosene, it may be shown that there were kerosene stains on his shirt. *State v. Kingsbury*, 58 Me. 238.

In *People v. Doneburg*, 64 N. Y. Supp. 438, where a person after committing arson was traced across a ditch, in crossing which it appeared that he had fallen on his knee and elbow, evidence was held admissible to show that defendant's clothing was discolored at those places.

#### *Blood Stains.*

It may be shown that a suit of clothes belonging to the defendant had blood stains on it, even though it is not established that he wore that suit on the day of the murder. *People v. Neufeld*, 165 N. Y. 43.

In *Murphy v. State*, 36 Tex. Cr. R. 24, 35 S. W. 174, the defendant was proved to have had blood stains on his shirt and face.

Other cases where blood stains were used as a mark of identification are *Cicely v. State*, 13 Smedes & M. (Miss.) 203; *Davis v. State*, 126 Ala. 44; *Newman v. State*, 32 Tex. Cr. R.; *Com. v. Crossmire*, 156 Pa. 304.

Experts are allowed to testify that they can determine whether certain blood is human or not, and further as to whether the blood in question is human. *Com. v. Sturtivant*, 117 Mass. 122; *State v. Knight*, 43 Me. 1, 133; *Knoll v. State*, 55 Wis. 249.

Evidence of a test by physicians as to a spot of supposed blood on the defendant's clothing is admissible. *Beavers v. State*, 58 Ind. 530.

One who is not an expert may testify that certain spots seen by him are blood spots. "The testimony of the chemist who has analyzed blood and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal."

People v. Gonzales, 35 N. Y. 49; People v. Greenfield, 85 N. Y. 75. 39 Am. Rep. 636; Gaines v. Com., 50 Pa. 330.

*Articles of Property Used to Identify.*

It may be shown that the deceased had a number of \$20 bills; that after the homicide the defendant changed one such bill and hid others in a cellar, where they were found. *State v. Gallivan*, 75 Conn. 326.

In *People v. Hamilton*, 137 N. Y. 531, the defendant's identification as the murderer of his wife was aided by the finding of a cuff-button near her body like an odd one in his room, the finding of a razor near her body, and the fact that his razor was gone, and the finding of defendant's cane on the scene of the crime.

In *State v. Howard*, 118 Mo. 127, part of the means used to identify the defendant as the murderer were a pocket-book and a manuscript poem found near the body and shown to have been in the possession of the defendant a short time previously.

Where the State alleged that the defendant, after shooting the deceased with a 30-30 caliber rifle, fled along a certain road in a sparsely settled country, it was allowed to prove the finding of cartridges of 30-30 caliber along that road two miles from the scene of the crime and two weeks later. *Horn v. State (Wyo.)*, 73 Pac. 705.

In the case of *People v. Durrant*, 116 Cal. 179, 205, where the defendant was charged with the murder of a girl, it appeared that the rings which she had worn were after her death sent by mail, wrapped in a scrap of the "San Francisco Examiner," to the girl's aunt. On this scrap of paper were written two names in the defendant's handwriting, one being the name of defendant's classmate, the other the name of one of defendant's instructors. These names, with admittedly genuine specimens of defendant's handwriting, were given to the jury.

In *King v. State (Tex.)*, 67 S. W. 410, it was shown that defendant had in his possession, when arrested while committing a subsequent burglary, a brace taken from the house in question.

It may be shown that defendant stated what had become of part of the goods stolen, and that he had been seen on the road between the scene of the crime and the place where he was arrested. *State v. Armstrong*, 170 Mo. 406.

A pistol stolen from the house and found in the possession of one of the defendants is admissible as against the others also. *Terry v. State* (Tex.), 47 S. W. 654.

In *Com. v. Webster*, 5 Cush. 295, to identify the defendant as the murderer of Dr. Parkman, it was proved that portions of the latter's body, his teeth, bones, etc., were found about the medical college where Professor Webster was employed.

### *Gun-wadding.*

In *Williams v. State* (Ark.), 16 S. W. 816, the defendant was charged with shooting the deceased with a shotgun. He was tracked by the sheriff with bloodhounds from the place of the crime to his home, and there they found a shotgun, one barrel of which had recently been discharged. The gun-wadding found at the scene of the crime was just like that in the undischarged barrel of the gun, and the defendant's shoes exactly fitted tracks leading from the house of the deceased.

The evidence identifying the defendant in a murder case as having been at the place where the shot was fired was as follows: The tracks near the place were shown to be like his; at his house were found a gun lately fired, and shot and wadding like that used by the murderer; and on the fence where the shot was fired was found a note on a leaf from the defendant's note-book and in his handwriting with threats against the deceased. *Caldwell v. State*, 28 Tex. App. 566.

In *Freeman v. State* (Tex.), 72 S. W. 1001, the wadding of a gun fired by the defendant was found to be portions of a newspaper, the rest of which was still in the defendant's house.

### *Other Crimes.*

Evidence of another crime may be given to prove identity. *Goersen v. Com.*, 99 Pa. 388.

The commission of other crimes by the defendant may be proved to identify him as the doer of the act charged. *People v. Taylor*, 136 Cal. 19; *Yarborough v. State*, 41 Ala. 405; *Foster v. State*, 63 N. Y. 619.

To identify one who got a note by fraud, it is permissible to show that defendant got other notes from other persons by fraud. *Brown v. Schock*, 77 Pa. 471.

"The next assignment of error complains of the testimony of William J. Horner. He was the tenant of David Berkey, occupying his farm. In the morning after the robbery, he discovered that his barn had been broken open during the night and a pair of horses, bridles, a saddle, and a blanket had been taken away. He also found that the straps had been removed from his fly nets and were not in the barn. The straps were soon after discovered at Berkey's house, where they had been used to bind his limbs while he was undergoing torture. The horses, with the other stolen property, were found later in the morning some eight or nine miles away in a field at the side of the road leading from Berkey's house to the home of the defendants. An examination of the ground about Berkey's house showed that during the night the horses had been tied and fed near by, and had been ridden by the robbers along the highway to the point at which they were found, where it was evident they had been abandoned, their riders completing their journey on foot. The testimony of Horner was offered for the purpose of laying those facts before the jury. It was objected to because it related to another offence than that for which the defendants were indicted, and because it was not proposed to show that the defendants were seen in possession of the horses. But the relevancy of this testimony did not depend on whether it tended to show the commission of another crime, but on whether the facts were so connected with the crime under investigation as to throw any light upon its history. We think it clear that this testimony was explanatory of facts that were before the jury, and that it tended to show how, and by what route, the robbers fled from Berkey's house; and how it was possible for the defendants to have been seen so early in the morning of the 3d of June at points where witnesses placed them, consistently with the allegation of the commonwealth that they were the perpetrators of the crimes at Berkey's house." *Com. v. Roddy*, 184 Pa. 274, 288.

### *Footprints.*

Footprints about the scene of the crime, or leading to or from it, may be shown in evidence to correspond with the feet or shoes of the accused. *Young v. State*, 68 Ala. 569; *Jones v.*

State, 63 Ga. 395; *Gilmore v. State*, 99 Ala. 154; *Whetston v. State*, 31 Fla. 240.

In *Com. v. Sturtivant*, 117 Mass. 122, where the defendant's shoes were shown to fit certain tracks, the defendant denied having worn them recently. The State then showed that they had been recently washed, as though to remove mud on them.

To identify defendant as a burglar, it may be shown that he was seen running from the place and that his shoe tracks corresponded with tracks about the place. *People v. Rowell*, 133 Cal. 39.

Defendant was proved to have been the one who had stolen certain alfalfa seed by foot tracks about the granary, the tracks of two horses toward his house, an envelope addressed to defendant found near the tracks, and by the fact that he had later sold some alfalfa seed in sacks identified as belonging with the granary. *State v. Tucker (Ore.)*, 61 Pac. 894.

Where the accused had started barefoot toward a building with the intention of setting it on fire, evidence of the print of a bare foot several hundred yards from the burned house, but in the direction accused was going, was admitted. *Ethridge v. State (Ala.)*, 27 So. 320.

In *State v. Willmeier (Iowa)*, 72 N. W. 275, to identify defendant as having set a barn on fire, tracks similar to his were testified to, although they were not discovered for nearly a week, when the snow covering them had melted.

A father was identified as the murderer of his daughter by blood prints from her bed to his room and by the facts that there were no tracks whatever leading from the house and the ground was soft. A motive and other circumstances were also shown. *Butler v. State (Ark.)*, 63 S. W. 46.

Defendant was proved to have set fire to some buildings by proof that tracks which his shoes might have made led to his house, and further proof of motive on his part. *State v. Shines*, 125 N. C. 730.

In *Newman v. State*, 32 Tex. Cr. R., part of the evidence on which the defendant was convicted was as follows: The defendant's horse was seen hitched not far from the house of the deceased on the night of the murder, peculiar tracks which fitted defendant's shoes led from the house to the place where the horse had been tied, and spots that appeared to be blood were found on defendant's shirt.

Tracks from the place of a burglary to a camp where defendant had been. *Hollingshead v. State* (Tex.), 67 S. W. 114.

Voice and peculiar track used to identify defendant. *Patton v. State*, 117 Ga. 230.

Peculiar tracks which defendant's shoes exactly fitted used to prove defendant guilty of arson. *Weeks v. State* (Ga.), 30 S. E. 252.

Defendant cannot be compelled to make a footprint for comparison. *Stokes v. State* (Pa.), 8 Leg. Gaz. 166.

#### *Horse and Wagon Tracks.*

In *Cook v. State* (Miss.), 28 So. 833, the defendants were traced from the scene of the burglary to their home by the track of a wagon having a wobbly wheel and the track of a horse with a broken hoof. They were shown to have such a wagon and such a horse.

Defendant was identified as having stolen bales of cotton by proof that there were wagon tracks from the place where the bales had been hidden to the defendant's house, that his wagon was muddy, and that his team was sweaty. *Cole v. State* (Miss.), 4 So. 577.

In *Lancaster v. State*, 36 Tex. Cr. R. 16, it appeared that the defendant had been seen driving in a single buggy toward the home of the deceased ; that the tracks about the scene of the crime showed that such a horse and buggy had been driven near where the corpse lay, where the occupant had got out and walked to the corpse, then to the house, and back ; that the shoe tracks of the horse were peculiar, and were like those of the horse defendant had driven. The defendant was convicted.

#### *Tracks — Evidence in Rebuttal.*

Tracks to a building which defendant was accused of blowing up were shown not to have been his by the fact that they were made by broad-toed shoes while his shoes had narrow toes. *Landers v. State* (Tex.), 47 S. W. 1008.

In *Grant v. State* (Tex.), 58 S. W. 1025, the State showed that a wagon containing oats stolen from a granary and drawn by a mule and a horse could be traced from the granary to near the defendant's house, and that there were shoe tracks about the size of

defendant's shoes. The defendant proved that others beside himself owned a wagon, a mule, and a horse, and that others wore similar shoes.

Where defendant's voice was thought to be recognized as that of a burglar and where tracks near by were identified as his, he proved that he had that day loaned his shoes to another, who had since disappeared. Identification not sufficient. *Porter v. State* (Tex.), 50 S. W. 380.

*Tracing by Bloodhound.*

It may be shown that a bloodhound, put on the track of a criminal, followed the track to the accused. *Simpson v. State*, 111 Ala. 6; *Pedigo v. Com.*, 103 Ky. 41.

Evidence of the tracking of an alleged criminal by a bloodhound is admissible in a burglary case on the question of identity. *State v. Hall*, 4 Low. Dec. (Ohio) 147, 3 Nisi Prius, 125. And the rule is the same in a murder case. *State v. Brooks*, 9 West. Law Journal, 109; *Williams v. State* (Ark.), 16 S. W. 816.

*Means of Identification in General.*

In the case of *People v. How*, 2 Wheel. Crim. Cas. (N. Y.) 410, the defendant was convicted of murder on the following evidence, although he was not seen and his voice was not recognized. He had had business troubles with the deceased and had threatened to kill him if he did not settle. He was seen shortly before, trying to conceal under his coat something that might have been a gun. He was gone from home at just the time of the murder, and returned at a time possible to the actual murderer. His horse, found blanketed and wet with sweat, he falsely said had been sick. A man who might have been the defendant was seen riding toward the home of the deceased, and shortly after the time of the crime was seen riding rapidly back. The defendant was shown to have a rifle with the barrel cut short off, so that it might be concealed under the coat. The rifle showed traces of having been fired lately, it had horsehair on it, and the priming was damp. The rifle carried a ball like that found in a beam, where it had lodged after passing through the deceased. The defendant later confessed his guilt.

In *State v. Orr*, 64 Mo. 339, the defendant was shown to be the murderer of the deceased by the following evidence: He was

shown to have left home on the day of the crime dressed in a blue army overcoat and riding a dark horse with a partner in the enterprise riding a white horse. One of them had a square gin bottle. They were seen on the road not far from the home of the deceased. Near by two horses had been hitched to trees, and that one of them was white was shown by hair rubbed on the bark. A square gin bottle lay on the spot. Shortly after the crime two men answering their description were seen riding away rapidly. Later the defendant had much money, while before he had none. He spoke of it as blood money. He did not try to explain his absence from home on that day.

In the case of *Cicely v. State*, 13 Smedes & M. (Miss.) 203, to identify the accused as the murderer of a whole family, it was shown that there were bloody footprints on the floor and one set of footprints leading from the house, all of which corresponded with the defendant's feet; that the murder was done with a broad-axe, and that on the dress of the accused were many specks and spots of blood; that the defendant had secreted on her person the purse of the deceased with money in it, and that the pocket of deceased's trousers was bloody as from a bloody hand thrust in; that defendant did not know the amount of money in the purse.

Defendant identified by evidence of his presence in the neighborhood, tracks leading to his home, and his possession of a weapon. *Howard v. Com.*, 24 Ky. Law Rep. 950, 70 S. W. 295.

### *Sufficiency of Identification.*

An example of an identification held to be sufficient is to be found in *Com. v. Roddy*, 184 Pa. 274, 289. The following is the deceased's testimony: "Two men came into my bedroom. I asked them what they wanted here, and one of them said, 'Money, by God, and we will have it.' Both men had revolvers, and said, 'Do you see these?' I said, 'Yes.' They told me if I had any prayers to say I was to say them, that they would shoot me. I told them to shoot, but they did not. Then they tied me, both hands and feet, and carried me out of bed into a rocking-chair and hit me in the mouth, knocking a tooth loose. Then they ransacked the safe. I told them my money was in my vest. They got it; it was about \$125 in paper and silver. They burned my feet some before getting my money. They continued to burn

my feet, demanding more money or government bonds. They first burned my feet with paper; afterwards with oil lamps and tallow candles. They ransacked the house from cellar to attic. They went to the cellar, brought up pies, cakes, and milk, and eat and drank. Then they left my house, and I am satisfied the two Roddy boys, brought to my house by the officers, are the same that robbed and tortured me." This is a vivid statement of the occurrences of that night, showing the opportunity Berkey had to see his torturers, to know their voices, their figures, their movements, their eyes, the color of their hair, and their relative size and manners. Every peculiarity of each of them must have been literally burned into the memory of both David Berkey and his wife. They were brought to the house of their victim. He looked at them to see if they were the same men he had seen on the night of the 2d of June. His conclusion is, "Yes. I am satisfied they are the same men. My mind is at rest on the subject. I have no doubt." This was a distinct identification, and plainly admissible.

. Testimony that the offender "looked pretty near like" the accused is not sufficient identification. *Com. v. Snow*, 14 Gray (Mass.), 385.

Positive direct evidence of the identity of the accused is not necessary if the jury are satisfied of the fact. *Com. v. Cunningham*, 104 Mass. 545.

In the interesting case of *Udderzook v. Com.*, 76 Pa. 340, the motive for murder was shown to be the desire to obtain insurance money. The circumstances were as follows:

The defendant and the deceased conspired to defraud certain insurance companies. In pursuance of the scheme, the deceased, W. S. Goss, insured his life for \$25,000. Goss was thereafter last seen in his shop in company with defendant and a neighbor. After they had gone Goss's shop burned, and a body supposed his, was found. The beneficiary in the policies, aided by her brother-in-law, the defendant, tried to collect the money. More than a year later the defendant was seen in company with one A. C. Wilson at Jennerville, Pa. In the evening they left that town together, driving in the direction of Penningtonville. The defendant reached Penningtonville alone, and his companion was never afterwards seen alive. When the defendant was asked what had become of his companion, he replied that he had left him at

Parkersburg. Later this companion's body was found, cut into pieces, and buried in two holes in the woods between Jennerville and Penningtonville. The question was to identify this body as that of W. S. Goss and to show that he and A. C. Wilson were one and the same. Wilson's movements were traced from about the time of Goss's disappearance, and he was shown to have lived with great privacy. At Jennerville he and the defendant had showed a desire for great privacy. A witness identified a photograph of Goss as being also that of Wilson. Letters written by Wilson were in the handwriting of Goss. He wore a peculiar ring belonging to Goss. Wilson had on one occasion recognized one A. C. Goss as his brother and was shown to have corresponded with him. Wilson and Goss were alike drunkards. The jury found these circumstances sufficient to identify the body found as that of A. C. Wilson and of W. S. Goss also, and the defendant was convicted.

To show that defendant was guilty of arson, it was shown that tracks might have been made by No. 9 shoes and his were that size, that in crossing a ditch the criminal had fallen on his knee and elbow, and that defendant's clothing was slightly discolored at those places. Held not sufficient to identify. *People v. Doneburg*, 64 N. Y. Supp. 438.

Although defendant's tracks were peculiarly like those found in the snow leading from a burned building toward but not near defendant's home, he was not sufficiently identified. *Green v. State*, 111 Ga. 139.

### *Bertillon Method of Identifying Criminals.*

As to methods of identifying persons, the following, taken from the Maryland Law Record and found in 9 Crim. Law Magazine, 372, is of interest:

"The latest method of identifying prisoners which has been introduced into France by M. Alphonse Bertillon, and which is now successfully practised, not only in the chief French prisons, but in Russia and Japan as well, is the exact measurement of the prisoner on his arrival at gaol. His waist, the length and width of the head, the left middle finger, the left foot, the outstretched arms, and three other fingers on the left hand, the left arm from the elbow to the wrist, and the length and width of the ear are

measured, and the color of the eyes and any particularities are noted down. A photograph is also immediately taken, and by these means the many mistakes which have been made by trusting to a photographer only are avoided. The fact that during the two years since this mode has been in operation eight hundred and twenty-six habitual criminals who presented themselves under an assumed name have been identified in France, shows that M. Bertillon's method is superior to any other. It is stated that habitual criminals, particularly English pickpockets, are so convinced of the infallibility of the method that they will on no account submit to the measurement, and offer violent resistance whenever the attempt is made to measure them. In such cases we are assured that it is nearly always sufficient to measure the inside of the hat and the boots."

*Personal Peculiarities for Identification.*

The following story of the identification of a criminal is derived from the London Tid-Bits: A small lodging-house in the City Road was one morning found to be the scene of a mysterious crime. The occupant of the ground floor had been discovered seated by the table dead, his head resting on his folded arms, and a small penknife buried in his temple. When the police arrived the body had not been moved, but in spite of their careful search, no clue to the crime revealed itself. That he was not alone on the preceding night, a couple of glasses and an empty whiskey bottle clearly testified.

Dornton, the detective, first interviewed the landlord. The deceased could not have returned until very late. He frequented a public sporting-house in the neighborhood, and was believed to obtain a living by betting.

The detective turned over the letters of the deceased. Only one seemed of any importance, and that a short, ill-spelt note, naming an outsider as the winner of the St. Leger, and advising the deceased to back it heavily. The race had been run the preceding day, and the outsider had won. If the murdered man had acted on his correspondent's advice he should be in possession of a considerable sum of money. But with the exception of a few coppers, nothing of value was found.

At last, despairing of obtaining any further information on the scene, Dornton was about to close his investigation.

As he gave one final glance before departing, something in the threadbare carpet caught his attention. Stooping, he picked up a semi-circular piece of coarse finger-nail, marked by a fracture extending completely across it, which had continued, probably, some distance along the entire nail. Round this the detective wove his theory of the crime.

The deceased, already probably half drunk, had brought with him, to finish their carousal, some casual acquaintance. While the host was becoming more and more unconscious, his guest, drinking but little, determined to rob him of his day's winnings. Irritated by the broken nail catching in his clothing, he with a penknife trimmed it as closely as possible; then, seeing his companion completely at his mercy, murdered him.

Carefully guarding this slight scrap of evidence, after a moment's reflection, Dornton made his way to the public house mentioned as having been frequented by the deceased. His attention was speedily concentrated on one man. In spite of the assumed jauntiness of his manner, the latter was decidedly ill at ease, and his eyes continually wandered to the door. The low felt hat and cheap kid gloves concealing his hands had the appearance of having been recently purchased, though the state of his boots and clothing suggested anything but an air of affluence.

Under the pretence of obtaining a light, Dornton moved, glass in hand, to where the object of his suspicions carelessly lolled, and stumbling, as if by accident, completely saturated the gloves with its contents. The stranger angrily tore them off, and, on the middle finger of the left hand, revealed to the detective's watchful eye a short, coarse nail, broken nearly to the quick.

A few minutes later he was inside a cab, journeying to the police station, and his full confession at the inquest gave Dornton the satisfaction of having his theory completely verified.

*Identification of Articles of Property. — Means of  
Identifying Property.*

To identify certain watches in possession of defendants as the ones stolen, the owner of the store may give in evidence the bills showing the numbers on the watches. *State v. Fitzgerald*, 72 Vt. 142.

"A recent case occurred in this Court where one was indicted for murder by stabbing the deceased in the heart with a dirk-knife. There was evidence tending to show that the prisoner had possession of such a knife on the day of the homicide. On the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards, upon a *post mortem* examination of the deceased, the blade of a knife was found broken in his heart, causing a wound in its nature mortal. Some of the witnesses testified to the identity of the handle, as that of the knife previously in the possession of the accused. No one, probably, could testify to the identity of the blade. The question, therefore, still remained, whether that blade belonged to that handle. Now, when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other that no person could doubt that they had belonged together, because from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match." Shaw, C. J., in *Com. v. Webster*, 5 Cush. 295, 314.

Where the defendant is charged with the larceny of gold coins, it may be proved that there were found in his possession the same number of gold coins as was taken from the owner, and that they were of the same denominations. *People v. Piggott*, 126 Cal. 509.

Where the handle of the hammer used in a homicide was found on the premises of the defendant, and much gold coin belonging to the deceased was found in possession of the wife of defendant, while at the same time it was shown that defendant had had no work for some time, and an attempted alibi was broken down, the evidence was held sufficient to sustain a conviction. *State v. Craemer*, 12 Wash. 217.

An illiterate witness may identify a document by its general appearance. *Com. v. Meserve*, 154 Mass. 64.

Before possession of the stolen goods can be used as the basis of an inference of guilt, the goods must be proved to be identical with these belonging to the party injured by the crime. Yet such identification need not be absolute. It would be sufficient to show that they are of the same kind as the goods stolen, and were found with other property stolen at the same time that is positively identified. *Dillon v. People*, 1 Hun, 670.

The identification of stolen goods by the owner may be sufficient, even though he was allowed to inspect them before being required to describe them. *State v. Lull*, 37 Me. 246.

The identification of a shirt is sufficient when a witness testifies that she made it herself and knows the sewing. *Lancaster v. State*, 91 Tenn. 267.

#### *Laundry Marks.*

The contents of a valise may be identified as belonging to a certain deceased person by comparing laundry marks on clothing in the valise with similar marks on clothing left by the deceased in his trunk. *State v. Lucey* (Mont.), 61 Pac. 994.

#### *Label on Barrels.*

The label on a barrel of beer was admitted to identify the barrel and the place from whence it came. *Com. v. Collier*, 134 Mass. 203.

#### *Color and Smell of Alcohol.*

To prove an arson, a witness may testify as to the contents of a bottle found near by, that she knew the contents were alcohol by the color and smell. *People v. Fitzgerald*, 137 Cal. 546.

#### *Color of Paper.*

Where it was shown that the defendant was given a certain check and that when arrested he had chewed a bit of paper beyond recognition, the chewed-up wad may be shown to be of the same color as other checks like the one given him. *People v. Considine*, 105 Mich. 149.

#### *Cattle Brands.*

In many western States and in Canada there are statutes making the presence of a registered brand on cattle evidence as to the ownership of such cattle. Colo. Mills Ann. Stat., §§ 4240, 4251. But an unrecorded brand may be admissible as a mark of identification. *Chestnut v. People*, 21 Colo. 512.

To identify a certain hide as that of a cow that had been stolen, it is proper to put in evidence pieces of the hide, which, when put with the main portion, tend to make out the brand. *Hendricks v. State*, 56 S. W. 55 (Tex.).

A recorded brand is evidence of the ownership of an animal marked with the brand. *Alexander v. State*, 24 Tex. App. 126.

Earmarks on animals alleged to have been stolen, testified to by the claimant as his mark, are some evidence of ownership. *People v. Bolanger*, 71 Cal. 17.

A brand on a horse may be proved to establish identity of the horse, even though it is not the brand of the alleged owner. *Horn v. State*, 30 Tex. App. 541.

Where defendant was charged with stealing a certain horse which he had sold, the only evidence that the horse sold was the horse stolen was that it bore the same brand. The evidence of identity was not sufficient, because it was shown that the owner of the stolen horse had sold to third parties other horses with his brand on them. *Horn v. State*, 30 Tex. App. 541.

A mule alleged to have been stolen was identified by a peculiarly shaped brand. *State v. Hill*, 96 Mo. 357.

#### *Bullets, Cartridges, and Gun-wadding.*

Winchester rifle shells marked "W. R. A. Co. W. C. F. 40-65" were used to identify the defendants as having shot the deceased in *People v. Gibson*, 106 Cal. 458.

Where evidence tends to show that the bullet causing death of deceased was of 38-caliber, the defendant may be shown to have had a 38-caliber revolver at the time of the shooting (*State v. Barrett*, 40 Minn. 65); or that in the defendant's trunk were found cartridges of the same caliber. *People v. Minisci*, 12 N. Y. St. Rep. 719.

In *Freeman v. State* (Tex.), 72 S. W. 1001, the wadding of a gun fired by the defendant was found to be portions of a newspaper, the rest of which was still in the defendant's house.

It may be shown that on defendant's premises were found the frame of a pistol still smelling of powder, and several cartridges, the bullets in which were like that with which deceased was killed, even though the cylinder be not found. *People v. Smith*, 172 N. Y. 210.

#### *Possession of Property Obtained by the Crime.*

In *Com. v. Roddy*, 184 Pa. 274, it was shown that two weeks before the murder and robbery, the deceased had in his posses-

sion a ten-dollar Confederate bill, and that after the crime the defendant Roddy had a like bill and destroyed it.

"The evidence, together with Roddy's declaration about the bill or note, how he came by it, and why he destroyed it, was relevant upon the question of identity. It was not conclusive upon the question, but it related to it, and with other facts relating to the same subject was properly submitted to the jury as part of the chain of circumstances tending to identify the defendants as the perpetrators of the crimes committed."

Defendant identified as a burglar by a cut on his hand (the burglar had broken through a window), by having been seen that day with another who was killed at the scene of the crime, and by the fact that he wore shirts taken from another house while the dead burglar wore shoes stolen there. *People v. Hogan* (Mich.), 81 N. W. 1096.

The State may show that the stolen gun was found in the road near where the defendant had been when approached by the officer. *Hollenshead v. State*, 67 S. W. 114.

To identify defendant as the owner of a truck in which stolen goods were found, the State may show that he claimed clothing in it. *State v. Yandle*, 166 Mo. 589.

To identify a shirt as having belonged to the defendant, where a witness had sworn that it did not belong to the defendant, it may be shown that she gave it to a messenger who asked for the defendant's shirt. *State v. Houser*, 28 Mo. 233.

#### *Instruments with which Crime was Committed.*

The defendant was shown, in *Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325, to have had a cudgel in his possession which was later found near the body of the deceased and with which the killing had been done, and was shown further to be wearing the deceased's hat while his own was near by the body.

Where it has been shown that certain tools were used in a burglary, possession of such tools is competent evidence to fasten the crime upon the possessor. *People v. Winters*, 29 Cal. 658; *State v. Morris*, 47 Conn. 179; *State v. Harrold*, 38 Mo. 496.

To identify the deceased as a burglar it was shown that the tools used came from his place of residence. *People v. Larned*, 7 N. V. 445.

The presence of burglar's tools on defendant's farm may be shown when he was the only occupant of such farm. *People v. Gregory* (Mich.), 90 N. W. 414.

The State may introduce in evidence, to prove defendant guilty of arson, a flask with kerosene in it marked as with bluing, and may show that defendant's wife previously had this flask with bluing in it. *Morris v. State* (Ala.), 27 So. 336.

Where a knife was found at the scene of a burglary, and defendant was shown to have said the next day that he had lost his knife, the identification of the knife as his by this and other testimony was held to be sufficient. *Bundick v. Com.*, 97 Va. 783, 34 S. E. 454.

Defendant was identified as a burglar by a case-knife, the rim part of which was in his possession, but the broken point was wedged in the door-jamb of the burglarized house. *White v. People*, 179 Ill. 356.

A bottle of powder found on the road may be introduced to prove safe-blowing, when it is shown that defendant had a bottle at starting and none at the end of the journey. *Edmunds v. State* (Tex.), 63 S. W. 871.

Where a mask was found near a window through which a shot had been fired, it may be shown that the defendant was shown the mask without saying where it had been found and asked where he got it, and that he replied that his children had found it and that it had once had a black nose that had been torn off. *Murphy v. People*, 63 N. Y. 590.

#### *Question for the Jury.*

The identification of stolen property is for the jury, and it is error to charge that a banknote stolen "was positively identified." *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

#### *Proof of Handwriting.*

*Opinions of Persons Acquainted with the Handwriting.* "When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer, that it was or was not written or signed by him, is deemed to be a relevant fact.

"A person is deemed to be acquainted with the handwriting of

another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him." Stephen's Dig. Evid., Art. 51.

A witness may not testify as to his knowledge of a signature made by making a mark. *Shinkle v. Crock*, 17 Pa. 159.

The testimony of a person as to his own signature is of no higher character than the testimony of another who is acquainted with his handwriting. *Lefferts v. State*, 49 N. J. L. 26.

*Knowledge of Hand Gained from Correspondence.*

A witness who has become acquainted with handwriting through an official correspondence is competent to testify as to its genuineness. *Com. v. Smith*, 6 S. & R. 568; *U. S. v. Simpson*, 3 P. & W. 437.

One who has corresponded with a person is a competent witness as to his handwriting (*West v. State*, 2 Zab. (N. J.) 212; *Smith v. Walton*, 8 Gill (Md.), 77; *Edelen v. Bennett*, 8 Gill (Md.), 87); but not if he has merely seen writings addressed to others. *Goldsmith v. Bane*, 3 Hal. (N. J.) 87.

*One Who Has Seen Him Write.*

*Diggin's Estate*, 68 Vt. 198; *Com. v. Hall*, 164 Mass. 152; *State v. Harvey*, 131 Mo. 339; *Karr v. State*, 106 Ala. 1; *State v. Farrington*, 90 Iowa, 673.

It is enough that he has seen him write once to render the testimony competent. *Com. v. Nefus*, 135 Mass. 533; *Keith v. Lathrop*, 10 Cush. (Mass.) 453; *Brigham v. Peters*, 1 Gray (Mass.), 139; *McNair v. Com.*, 26 Pa. St. 388; *State v. Stair*, 87 Mo. 268; *Smith v. Walton*, 8 Gill (Md.), 77; *Edelon v. Bennett*, 8 Gill (Md.), 87.

One who has seen a person write is a competent witness as to his handwriting (*West v. State*, 2 Zab. (N. J.) 212; *Cook v. Smith*, 30 N. J. L. 387); but not when he saw the person write for the purpose of thereafter being a witness. *Whitmore v. Corey*, 1 Harr. (N. J.) 267.

A witness was held to be competent who had seen a person write his name twice thirty-two years before and once twenty-three years before. *Wilson v. Van Leer*, 127 Pa. 371.

*Comparison of Handwriting by Experts and the Jury.*

In the various States of the Union, there can be said to be no general rule as to the comparison of disputed writings with genuine ones, except the elementary doctrine that some comparison made be made both by experts and by the jury. There are many rules laid down as to the conditions under which such comparison may be made and as to the writings that may be used as a standard. Such evidence is, of course, strictly circumstantial in character.

Sometimes the writing to be used as the standard of comparison is required to be admitted to be genuine, sometimes its genuineness is left to the jury, and more often its genuineness is a preliminary question for the Court. Sometimes only such writings as are already before the jury may be used as a standard, but often other writings are admitted.

Many States have settled the law on this point by statute, and nearly all the remaining States have attempted to do so.

"Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence." Stephen's Dig. Evid., Art. 52.

This rule is statutory in England.

Substantially the English doctrine is held in *Koons v. State*, 36 Ohio St. 195; *State v. Zimmerman*, 47 Kan. 242; *Com. v. Andrews*, 143 Mass. 23.

Expert opinion is admissible to prove handwriting. *Travis v. Brown*, 43 Pa. 9; *Fulton v. Hood*, 34 Pa. 365; *Burkholder v. Plank*, 69 Pa. 225; *Ballentine v. White*, 77 Pa. 20; *West v. State*, 2 Zab. (N. J.) 212.

Expert testimony as to handwriting is admissible, although the entire knowledge of the expert on the subject is derived from comparison of the disputed writing with writing admitted to be genuine. *Miles v. Loomis*, 75 N. Y. 287; *Moody v. Rowell*, 17 Pick. 490; *State v. Shinborn*, 46 N. H. 497; *Calkins v. State*, 14 Ohio St. 222.

An expert may give his opinion as to whether a certain specimen is in a natural or a simulated hand. *Com. v. Webster*, 5 Cush. 295; *Moody v. Rowell*, 17 Pick. 490; *Reg. v. Shepperd*, 1 Cox Cr. Cas. 237.

In *Com. v. Webster*, 5 Cush. 295, evidence was introduced of three anonymous letters alleged to have been written by the accused, addressed to the city marshal, and attempting to divert suspicion away from the medical college where defendant was professor of chemistry. Expert testimony was allowed to show that the letters were not written with a pen or with a brush, and yet that they were in defendant's handwriting. It was further shown that a small pine stick, about six inches long, and as large as a goose-quill, and having a small wad of cotton which had been dipped in ink wound round one end, was found in the defendant's laboratory.

Comparison of genuine writings with the one questioned may be made by the jury. *Rockey's Estate*, 155 Pa. 453.

As to the use of other writings for comparison to prove the genuineness of a writing in dispute, the Court says, in *State v. Hastings*, 53 N. H. 461: "It is to be received, and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine. If they find it is not so, then they are to lay this writing, and all the evidence based upon it, entirely out of the case; but if they find it genuine, they are to receive the writing, and all the evidence founded upon it, and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final main question whether the signature in dispute is or is not genuine."

Qualification of a handwriting expert. *Wheeler & Wilson Co. v. Buckhout*, 60 N. J. L. 102.

Cashiers and tellers of banks, whose business it is to compare handwritings and to detect forgeries and counterfeits, are gener-

ally held to be qualified experts on the subject of handwriting. *Lyon v. Lyman*, 9 Conn. 59 ; *State v. Phair*, 48 Vt. 366 ; *People v. Hewitt*, 2 Parker's Cr. Cas. 20 ; *Dubois v. Baker*, 30 N. Y. 355.

An expert is not competent when the basis of his testimony is that he observed the person write several times for the purpose of testifying later. *Reese v. Reese*, 90 Pa. 89.

### *Illegible Writing.*

Expert testimony is admissible to determine whether a certain written word is "Jany" or "July." *Dresler v. Hard*, 127 N. Y. 238.

### *Testing an Expert's Opinion.*

A very broad liberality should be allowed as to the cross-examination of an expert to test the value of his opinion. Other genuine writings, and writings not genuine, may be submitted to him, and his opinion asked as to their authorship, with his reasons in each case. *Hoag v. Wright*, 174 N. Y. 36 ; *Browning v. Gosnell*, 91 Iowa, 448.

And it is frequently allowed to test the expert by presenting to him other documents already in the case. *Harvester Co. v. Miller*, 72 Mich. 272 ; *Thomas v. State*, 103 Ind. 439 ; *Brown v. Chenoweth*, 51 Tex. 477.

But it has been held improper to test an expert with fabricated signatures not already in the case. *Gaunt v. Harkness*, 53 Kan. 405 ; *Tyler v. Todd*, 36 Conn. 222 ; *Andrews v. Hayden*, 88 Ky. 455.

Handwriting admittedly genuine may be handed to a witness who has given his opinion as to the genuineness of another writing in order to test that opinion. *Bank v. Armstrong*, 66 Md. 113.

On cross-examination, a person's signature, written in court, may sometimes be used, but only in cross-examination. *Com. v. Allen*, 128 Mass. 46 ; *U. S. v. Mullaney*, 32 Fed. Rep. 370 ; *Bradford v. People*, 22 Colo. 157.

### *Weight of Expert Evidence on Handwriting.*

In *Re Gordon's Will*, 26 Atl. 277, the Court writes as follows : "Handwriting is an art concerning which correctness of opinion is

susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indications of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until convictions will become irresistible. Thus comparison is rated after the fashion of circumstantial evidence, depending for strength upon the number and prominence of the links in the chain. Without such demonstration the opinion of an expert in handwriting is a low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful."

Evidence of handwriting experts is of low degree. *Life Ins. Co. v. Brown*, 30 N. J. Eq. 193, 32 N. J. Eq. 809.

The opinion of a handwriting expert is of little weight unless accompanied by an ocular demonstration. *Gordon's Case*, 50 N. J. Eq. 397, 52 N. J. Eq. 317.

#### *Comparison of Hands by Lay Witnesses.*

It is not permissible for a comparison of handwriting to be made by a witness who is not an expert, for presumably the jury is equally well qualified with him to make the comparison. *Page v. Homans*, 14 Me. 482; *Lowe v. Dorsett*, 125 N. C. 301; *Nil-ler v. Johnson*, 27 Md. 13; *Strother v. Lucas*, 6 Pet. 766.

#### *Refreshing Memory of Handwriting.*

But though a lay witness may not express his opinion based upon a comparison of hands, if he is competent as having seen

the person write whose signature is in dispute, or as having corresponded with such person, then he may, for the purpose of refreshing his memory, examine in court the specimens which are the basis of his knowledge of the handwriting. *National Bank v. Armstrong*, 66 Md. 115; *Thomas v. State*, 103 Ind. 419; *McNair v. Com.*, 26 Pa. 390; *Smith v. Walton*, 8 Gill, 85.

A witness may refresh his memory of handwriting by inspecting a genuine paper, but he must testify independently of the comparison. *McNair v. Com.*, 26 Pa. 388.

*Standard of Comparison. Writings before the Jury.*

Many States, in allowing a comparison of disputed writings to be made by the jury or by experts, restrict the comparison to writings already before the jury for other purposes. *Snider v. Burks*, 84 Ala. 56; *Miller v. Jones*, 32 Ark. 343; *Tubker v. Hyatt*, 144 Ind. 635; *Brobston v. Cahill*, 64 Ill. 358; *State v. Batson*, 108 La. 479 (in crim. cases); *People v. Parker*, 67 Mich. 222.

*Writings Already before the Jury and Admittedly Genuine.*

Some States also require that the standards of comparison shall be admitted to be genuine, even though already before the jury. *Rogers v. Tyler*, 144 Ill. 652; *Geer v. M. L. & M. Co.*, 134 Mo. 85. (But see St. 1895, p. 284, Rev. St. 1899, § 4679.)

The jury may compare a disputed handwriting with one admittedly genuine already in evidence for another purpose. *Williams v. Drexel*, 14 Md. 566.

*Standard May be Proved Genuine.*

But many States allow writings to be used by both experts and the jury for comparison, if such writings have been satisfactorily proved to be genuine, even though they are not already in the case. *State v. Stegman*, 62 Kan. 476; *Lyon v. Lyman*, 9 Conn. 60; Maryland, Pub. Gen. L. 1888, Art. 35, § 6; *Moody v. Rowell*, 17 Pick. 490; *First Nat. Bk. v. Carson*, 48 Neb. 763; *Mutual B. L. Ins. Co. v. Brown*, 30 N. J. Eq. 201; *Travis v. Brown*, 43 Pa. 9; *Adams v. Field*, 21 Vt. 264; *Carter v. Jackson*, 58 N. H. 157; *Bell v. Brewster*, 44 Ohio St. 696.

Papers may be admitted in some States for the sole purpose of comparison. *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; *Com. v. Allen*, 128 Mass. 46; *contra*, *People v. Parker*, 67 Mich. 222; *State v. Thompson*, 132 Mo. 301; *Stokes v. U. S.*, 157 U. S. 187.

*Standard Admittedly Genuine.*

Some States apparently allow writings not already before the jury to be used as standards of comparison only if they are admitted to be genuine. *Morrison v. Porter*, 35 Minn. 425; *Wilson v. Beauchamp*, 50 Miss. 32; *Moore v. U. S.*, 91 U. S. 270; *State v. Clinton*, 67 Mo. 385. (See Rev. Stat. 1899, § 4679.)

Letters admitted to be genuine may be given to the jury for comparison, but such letters should be selected for that purpose whose contents are not likely to influence the jury in any way. *Gambrill v. Schooley*, 95 Md. 260.

*Genuineness of the Standard of Comparison.*

Before a specimen may be used for comparison, its genuineness must be beyond doubt. "The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it that are doubtful, to ascertain whether they belong to the same class or not; but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury." *Univ. of Illinois v. Spalding*, 71 N. H. 163.

Writing offered as a test for comparison must be proved conclusively to be genuine. *Baker v. Haines*, 6 Whart. 284; *Depue v. Place*, 7 Pa. 428; *Travis v. Brown*, 43 Pa. 9.

*Genuineness of Standard a Preliminary Question for the Judge.*

To avoid the introduction of collateral issues before the jury and the consequent confusion of the main issue, the question of the genuineness of the standard should not be submitted to the jury at all. It should be treated as a preliminary question of admissibility to be settled by the Court. In this case of *University of Illinois v. Spalding*, 71 N. H. 163, the Court says: "The true rule is that, when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence."

This rule is adopted by statute in some States and by the courts in others. Colorado, St. 1893, p. 264; California, C. C. P. 1872, § 1944; Florida, Rev. St. 1892, § 1121; Kentucky, Stats. 1899, § 1649; Missouri, Rev. St. 1899, § 4679; New York, Laws 1888, c. 555; Montana, C. C. P. 1895, § 3235; Wisconsin, Stats. 1898, § 4189; *Costello v. Crowell*, 139 Mass. 590; *State v. Thompson*, 80 Me. 194; *Travis v. Brown*, 43 Pa. 9; *Rowell v. Fuller*, 59 Vt. 692.

*Letterpress and Photographic Copies.*

A letterpress copy of handwriting cannot be used for comparison. *Cohen v. Teller*, 93 Pa. 123. Nor may photographic copies be so used. *Vanderslice v. Snyder*, 4 Pa. Dist. 424; *Ulmer v. Gentner*, 3 Penny (Pa.), 453.

*Verification of Dates and Times.*

*Type, Paper, and Ink* — To determine the genuineness or date of a writing, consideration may be given to the ink, the paper, and the type. *McCorkle v. Binns*, 5 Binney, 348; *Dubois v. Baker*, 30 N. Y. 361.

Expert opinion is admissible as to the character of the ink, the paper, or the type of a writing, to aid in determining its authen-

ticity. *Owen v. Mining Co.*, 9 C. C. A. 338, 61 Fed. Rep. 6; *Johnson v. State*, 2 Ind. 654; *Jones v. Finch*, 37 Miss. 468.

*Difference in Ink.*

To show that two documents were signed at different times, it may be shown that they were written with different inks. *Porcell v. Cavanaugh*, 69 N. H. 364.

*Alterations and Erasures.*

Expert testimony is very generally admitted to determine the time of an erasure or an alteration, whether it was before or after the execution of the instrument, or whether there actually has been any alteration at all. *Ross v. Sebastian*, 160 Ill. 604; *Fee v. Taylor*, 83 Ky. 263; *Dubois v. Baker*, 30 N. Y. 361; *Stevenson v. Gunning*, 64 Vt. 601; *Ballentine v. White*, 77 Pa. 26.

*Fixing Time.*

It is admissible to prove the time when a certain occurrence, foreign to the case, took place, for the purpose of fixing by it the time when a certain act, within the case, was done. *Quintard v. Corcoran*, 50 Conn. 38.

A letter cannot be introduced to establish the time of its receipt. *Com. v. Burns*, 7 Allen (Mass.), 540.

Conversation, in order to be admissible to fix a date, must have reference to something which tends to establish it. *Fisk v. Cole*, 152 Mass. 335.

In order to show whether the defendant had shaved his moustache before or after the time of a homicide, one witness was allowed to say that it was not shaved on the day of a certain altercation in a store, and the date of that altercation was proved by another witness. *Com. v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306.

Where the date of a receipt is in issue, the time the money was actually received is relevant. *Armstrong v. Burrows*, 6 Watts. (Pa.) 266.

To fix the time he met the defendants, witness may say that it was the day before he heard of the safe-breaking. *State v. Ellsworth*, 130 N. C. 690.

To show that a burglary was done before sunrise, which oc-

curred at 7.04, it was proved that the owner knew of the burglary between 7 and 7.30 A.M., and that the acts could not have been done in so short a time. *Taylor v. Terr. (Ariz.)*, 64 Pac. 423.

To show that two witnesses are testifying in regard to the same place and time, they may give in evidence acts and statements at that time to identify it. "Any circumstance or act occurring at that transaction and remembered by both witnesses would show that they were testifying to the same occasion and would be clearly competent. So we are of opinion that the conversation of the parties or any declarations made at the time are to be regarded as of the nature of verbal acts, and admissible for the purpose of identifying the occasion of which the witnesses speak. Statements used for this limited purpose are admitted without regard to the truth of the facts stated." *Earle v. Earle*, 11 Allen 1.

*Evidence as to Handwriting.*

A recent case in which the admissibility of evidence as to handwriting is authoritatively discussed, both at common law and under a modern statute, is *People v. Molineux*, 168 N. Y. 264, 318.

There the trial court admitted as standards of comparison three classes of writings: First, fifty-six specimens conceded by the defendant to be genuine; second, seven specimens written by the defendant at the request of an expert, after the defendant was suspected but before his arrest, for the purpose of comparison by that expert; and, third, certain letters written, as claimed on the part of the prosecution, by the defendant in the names of H. C. Barnet and H. Cornish.

The purpose of the evidence was to show that the defendant addressed a certain package, containing poison, to one Harry Cornish, which poison was later taken by Mrs. Katharine J. Adams with deadly effect.

The New York Statute provides that "Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings."

The defence contended that this statute permits comparison only in case the "disputed writing" is itself in issue. But the Court says (page 324): "We think it too clear for extended argu-

ment that the 'disputed writing' referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. . . . If a disputed handwriting is itself either a fact in issue or a fact relevant to the issue, it may be proved by the means pointed out by the statutes."

The Court hold that all three standards were admissible, provided their genuineness was established by proper evidence. The first class of writings was beyond question admissible. The second class was also admissible. The Court says: "Writings created *post litem motam* are inadmissible in favor of a party creating them. But we have found no case holding that such writings should be excluded when offered by the adverse party."

As to the letters written in the names of Barnett and Cornish, which had been introduced in evidence for other purposes, but were also used as a standard of comparison, it is held that they were properly used as standards in case they were proved to the satisfaction of the Court by evidence that was admissible under the general rules of the common law for that purpose. In criminal cases such genuineness must be established beyond a reasonable doubt. Nor even then can such standards be used if they are incompetent on some other ground, as it was here held the Barnett letters were.

See note on this case after Chap. VII. "Poisoning Cases."

### *Belief of Witness as to Handwriting.*

If a witness is competent to testify as to handwriting, his belief is admissible, though it be not a positive one. The following is taken from the trial of Richard P. Robinson, as reported in "Remarkable Trials," page 181:—

Joseph Hoxie, Sr., employer of the defendant, was examined by Mr. Morris.

*Q.* Did you become acquainted with his handwriting from seeing him write?

*A.* I have seen him write frequently.

Mr. Morris then handed to the witness a MS. book (being the private diary of Robinson), and asked him if that was in the handwriting of the prisoner. The witness replied I dare not

swear it is ; there is a considerable variety of hands in the book itself.

*Q.* Can you see any part of the book where you can identify the prisoner's handwriting?

*A.* Some parts of the book look something like the character of his handwriting ; I have little opportunity of judging of any part of his writing except from what I have seen in my books, and that is a plain business-hand character — unlike what I see generally in the book. On looking carefully over the book, I cannot see any writing that I would venture to swear positively to be his. I would not like to swear positively to the handwriting of any man in the world, and if the Court please I will state my reasons.

*Q.* Is it because you would not like to swear to the handwriting of any man in the world that you do not choose to swear to the handwriting in that book?

*A.* No, sir ; that is only one of my reasons ; there are some parts of the book where there is writing that I believe to be the prisoner's, but I shall hesitate to swear to it positively.

*Q.* Please, sir, point out such parts as you believe to be his.

*A.* If I say even that I believe the parts to be his, I should qualify my assertion by stating that I was in doubt whether the handwriting was his, or that of another person in my employ, whose handwriting is very similar to what I see throughout the book.

*Q.* What person do you mean, sir?

*A.* Mr. Francis P. Robinson.

*Q.* Is he in New York, sir?

*A.* He is not ; he is in Europe.

*Q.* When did he go to Europe?

*A.* On February 26 last.

*Q.* Look at the latter part of the book, sir, and at the dates, and see, after the date of which you speak, whether you find any handwriting that you believe to be the writing of the prisoner.

Mr. Maxwell objected to this course of the examination as illegal, and as not being within the ordinary rule of evidence.

Mr. Phenix replied, and after a brief technical discussion Judge Edwards decided that it was quite proper to ask of the witness his belief as to the handwriting of the prisoner, and that his belief on the subject was admissible testimony.

*The Trial of Richard P. Robinson.*

On June 2, 1836, Richard P. Robinson was put on trial in New York City for the murder of Dorcas Doyen, alias Helen Jewett. It is a good illustration of successful defence against strong incriminating circumstantial evidence.

There was an unusual amount of interest taken in the case, not only because of the atrocity of the murder, but because of the romantic and abandoned character of the life of the beautiful Helen Jewett.

The deceased, whose real name was Dorcas Doyen, was born of respectable parents, but went wrong morally at the early age of eleven. The lad with whom she consorted was, however, sent to sea, and Dorcas reformed. She was adopted into a wealthy family, was educated by them, and grew to be a beautiful and accomplished young lady. One day she was confronted by the sailor with whom she had consorted in youth, and a new intimacy sprang up. The affair was discovered, and the girl was cast out and disowned by the family who had done so much for her. She drifted from city to city, now being on the point of marrying a wealthy man of good repute, who was warned by an anonymous letter, and now being in want and distress. At last she became a resident of a house of prostitution in New York. She had originally been decoyed into the business, under the pretence of giving her work as a seamstress.

On April 10, 1836, the girl, then known as Helen Jewett, was found murdered in her bed in the house of prostitution.

The defendant was a young man of good family, who was in the employ of a prominent business house in the city. The young man had been living a fast life, and was known at the house of prostitution in question, and in the lower world of New York generally, as Frank Rivers.

He had met Helen Jewett, and the two had fallen violently in love. After consorting together for some months, his love cooled. Rumors of other sweethearts, and even of an approaching marriage, reached Helen's ears; she became very jealous, and even threatened to expose the defendant to the world as the profligate he really was.

All this was proved to show the motive that the defendant had to commit such a crime.

The further evidence to show that the defendant was actually the man who killed Helen Jewett was as follows: The keeper of the house of prostitution, one Rosina Townsend, testified that she saw the defendant, known to her as Frank Rivers, at her house on the night in question; that she herself admitted him and recognized him, although he had drawn his cap over his face and had drawn his cloak about his mouth and chin; that she had later, about 11 P. M., taken a bottle of champagne to the room then occupied by Helen Jewett and the defendant, and that she distinctly saw the defendant lying on the bed, noting particularly a certain bald spot on the back of his head; that before daylight the next morning she was roused, and found Helen Jewett dead, with her head split open and the bed-clothing all about her body on fire. Two of the girls who were inmates of the house also testified that the defendant, known to them as Frank Rivers, was with Helen Jewett that night. The murderer, in escaping from the house, had carried down Helen's lamp, and got out of the back door, arousing no one.

One girl had heard the sound of a heavy blow, followed by a moan, and left her room to investigate; but there was no further noise, and she desisted.

The officers, upon investigation, found a cloak in the back yard, a cloak that was proved to have been worn on that and other nights by the defendant. It was identified by the material, the color, the style, and by a peculiarity of a cord with a silk tassel that was attached to the cloak. When the defendant was arrested, he was asked by the officers if he possessed such a cloak, and he said not, and pointed to another as the only cloak he ever wore.

In a near-by yard was found a hatchet marked with blood, undoubtedly the weapon with which the crime was committed. The janitor of the store at which the defendant worked swore that he had missed the hatchet belonging to that store a day or two before the murder, and further swore that this was the hatchet formerly at the store.

In their days of affection the defendant and Helen Jewett had exchanged miniatures. The miniature of the defendant was proved to have been in Helen's possession two days before the murder, and the morning after the murder it was in the possession of the defendant.

The defence was conducted unusually well. The character of the witnesses for the prosecution was bitterly attacked with telling effect. Even the judge instructed the jury that the testimony of prostitutes is very weak. The evidence of the officers of the law was weakened by showing that they were on friendly terms with Rosina Townsend. Some inconsistent statements were proved.

Perhaps the most effective circumstance that was brought out on the part of the defence was the fact that two of the frequenters of this house of prostitution went by the name of Frank Rivers. When Rosina Townsend admitted this on the stand, the large court-room was filled with mingled cheers and hisses, indicating the various sympathies of the vast crowd in attendance. Throughout the entire trial, in fact, a seething mob assailed the doors, often numbering thousands, and on one day the Court was forced to adjourn, to obtain a great number of constables, and to threaten the crowd with the militia. Only after clearing the room of spectators could the trial at that time proceed.

The defence made a great effort to discredit Rosina Townsend's testimony that she saw the defendant in Helen Jewett's bed on the night of the murder. She had identified him positively by the unusual bald spot. It was attempted to show that the bald spot in question was not at that time visible, and that it did not become visible until the defendant, while in prison, and upon his physician's advice, had his head shaved because of falling hair. The shaving of the head and the presence of the spot were commented upon by the papers, and Rosina Townsend might have read of it. On the other hand, however, the prosecution attempted to show that she had mentioned the bald spot to several persons before the defendant's head was shaved.

Evidence was introduced to show that there was little light at the door when "Frank Rivers" was admitted that night, and that therefore Rosina Townsend might have been mistaken in her identification of the person admitted. Rosina Townsend and the other inmates of the house had testified that "Frank Rivers" arrived at the house at nine or nine thirty in the evening. The defence gave evidence of a partial, but at the same time very successful, alibi. A respectable grocer testified that on that evening the defendant had bought half a dollar's worth of cigars at his store and had remained there smoking until a quarter after ten. This store was over a mile away from the scene of the murder.

The grocer was not well acquainted with the defendant, but he had seen him a number of times, and he related definite circumstances indicating that he was not mistaken in this case, as that he had compared watches with the defendant when the clocks were striking ten, and he identified the defendant's watch.

The defendant's statement to the officers that he had no such cloak as the one found in the yard was explained by the fact that the cloak in question, which he actually had been wearing, did not in fact belong to him, but to one Gray, who had given it to the defendant as security for money loaned.

It appeared that the murderer, in escaping the back way, would have been obliged to scale a whitewashed fence, and there was evidence that when defendant was arrested his trousers were marked with some white substance. Evidence on the part of the defendant indicated that these white marks were paint marks obtained in the newly painted basement of the store where he worked.

A silk handkerchief bearing the name of another frequenter of the house, known there as Bill Easy, was found under Helen Jewett's pillow at the time of the finding of her body; but the prosecution introduced Bill Easy himself to explain how the handkerchief came to be there.

The prosecution introduced a drug clerk, who swore that the defendant, known to him then as Mr. Douglas, attempted a few days prior to the murder to purchase arsenic to kill rats. He identified the defendant with positiveness, but upon a vigorous cross-examination was said to have become "completely confounded."

After a charge to the jury that was on the whole favorable to the defendant, the Court commenting with severity upon the character of the State's witnesses, the jury returned a verdict of not guilty, after an absence from the court-room of ten minutes.

Very naturally, Robinson left New York, and is said to have married and become the father of a large family.

This case is fully reported in "Remarkable Trials," published in 1863.



## CHAPTER V.

### EXCULPATORY PRESUMPTIONS AND CIRCUMSTANTIAL EVIDENCE.

THE law of England recognizes several presumptions, *juris et de jure*, which create entire or partial exemption from criminal responsibility ; for instance, that an infant under the age of seven years cannot be guilty of crime, that an infant above that age and under fourteen years shall be *primâ facie* adjudged *doli incapax*, and that, as to certain offences connected with physical development, a minor under the age of fourteen years shall be conclusively presumed to be incapable of committing them, no evidence being admissible to the contrary (*a*). Such also is the presumption that offences committed by the wife in the presence of her husband shall, with certain exceptions, be considered to have been committed by his coercion (*b*). But the presumptions which concern the subject of this essay are of a different kind, consisting mainly of maxims drawn from well-digested experience, grounded upon considerations of natural equity, and framed for the purpose of securing a candid construction of the actions and motives of our fellow-men. They are in truth but particular enunciations of strict justice. An enumeration of some of the principal of these presumptions will form the subject of this Chapter.

(*a*) 1 Hale's P. C. chs. 3 and 58 ; 4 Bl. Comm. chs. 2 and 15.

(*b*) 1 Hale's P. C. c. 7 ; 4 Bl. Comm. c. 2.

1. In the investigation and estimate of criminal evidence there is an antecedent *primâ facie* presumption in favour of the innocence of the party accused, grounded in reason and justice, and recognized in judicial practice ; which presumption must prevail until it be destroyed by such a counter-vailing amount of legal evidence of guilt as is calculated to produce the opposite belief (c). It must be admitted that in the aggregate, the number of convictions vastly exceeds that of acquittals, and that the probability is that, in a given number of cases, far the greater number of the parties accused are guilty ; but according to all judicial statistics, and under every system, a considerable proportion of the persons put upon trial are legally innocent. In any particular case, therefore, the party *may* not be guilty, and it is impossible, without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is therefore a settled and inviolable principle, that till the contrary be proved, the accused shall be considered as legally innocent, and that his case shall receive the same dispassionate and impartial consideration as if he were really so.

2. It would be foreign to the subject of this essay to discuss the considerations which affect the credibility of evidence in general, such as the integrity, disinterestedness and ability of the witnesses, the consistency of their testimony, its conformity with experience, and its agreement with

(c) See the language of Lord Gillies in *Rex v. M'Kinley*, 33 St. Tr. 275 at col. 506.

collateral circumstances,—since these considerations apply to circumstantial only in common with all other testimonial evidence. It has been profoundly observed, that of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony (*d*) ; and it is obvious that all reasoning upon the relevancy and effect of circumstantial evidence presupposes its absolute verity, and that such evidence necessarily partakes of the infirmities incidental to all human testimony ; and experience has abundantly shown that facts apparently of the most convincing character have been fabricated and supported by false testimony. Every consideration, therefore, which detracts from the credibility of evidence in the abstract, applies *à fortiori* to evidence which is essentially indirect and inferential. In such cases, falsehood in the minutest particular more or less necessarily throws discredit upon every part of a complainant's statement. Hence, since facts can never be mutually inconsistent, or, as it has been well expressed, “one truth cannot contradict another” (*e*), circumstantial evidence frequently affords the means of evincing the falsehood of direct and positive affirmative testimony, and even of disproving the existence of the *corpus delicti* itself, by manifesting the incompatibility of that testimony with surrounding and concomitant circumstances, of the reality of which there is no doubt (*f*). Sir Matthew Hale mentions a very remarkable

(*d*) 1 Stewart's Collected Works, 247.

(*e*) Locke on the Hum. Underst. b. iv. c. 20, s. 8.

(*f*) Best on Presumptions (1844), p. 54.

case, where an elderly man was charged with violating a young girl of fourteen years of age, but it was proved beyond all doubt, that a physical infirmity rendered the perpetration of such a crime utterly impossible (*g*). The prosecutrix of an indictment against a man for administering arsenic to her, to procure abortion, deposed that he had sent her a present of tarts of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains, while after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the prosecutrix afterwards confessed that she had preferred the charge from motives of jealousy (*h*).

3. Irrespectively of and apart from any positive discrepancy in the account given by a complainant, there is a consistency of deportment and conduct grounded upon the invariable laws of our moral nature, which is essentially characteristic of truth and honesty, and the absence of which necessarily detracts from the credit of such evidence, and therefore tends to create a counter-presumption. We reasonably expect to discover in the *demeanour* of a person who

(*g*) 1 Hale P. C. c. 58.

(*h*) *Rex v. Whalley*, York Spring Assizes, 1821; Christison on Poisons, 4th ed. p. 106.

has just reason to complain of personal injury or violated honour or right, prompt and unequivocal indications of that sense of wrong and insecurity which such acts of violence or wrong-doing are calculated instinctively to arouse in every human mind. Sir Matthew Hale, in reference to one of the greatest of human outrages, says, "If she (*i.e.* the woman complaining) concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned" (*i*). These cautionary considerations are as cogent and as much needed at the present day as when they were written, and are applicable with more or less force to accusations of every description; but they are more especially weighty and pertinent in reference to the particular crime referred to, of which the learned author has said, that "it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent" (*k*). Such cases, he further observes, are not uncommon, and he has related the particulars of two cases, where, though the charges were groundless, the parties with difficulty escaped. "I only mention these instances," said that upright judge, "that we may be the more cautious upon trials of offences of this nature, wherein

(*i*) 1 Hale, P. C. ch. 58.

(*k*) *Ib.*

the court and jury may with so much ease be imposed upon ; without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses" (l). False charges of this kind have unhappily been too common and too successful in all ages. The social consequences of female dishonour are so deadly, and the inducements to falsehood and revenge so peculiar and so powerful, that there is no class of cases in which it is more important to obtain an exact knowledge of the motives and character of the complainant. For these reasons great latitude of cross-examination is permitted in cases of this kind, and it is competent to the prisoner to give evidence not only of the prosecutrix's *general* bad character, but also of previous acts of immorality committed with himself ; with regard, however, to other particulars of alleged misconduct, such as alleged acts of immorality with other men, the general rule holds good that the prosecutrix's answers on cross-examination cannot be contradicted (m).

4. Nor is the danger of false accusation confined to the particular class of offences which has been specially adverted to. Inducements to prefer false

(l) 1 Hale, P. C. ch. 58.

(m) *Reg. v. Holmes*, L. R. 1 C. C. R. 334 ; *Reg. v. Riley*, 18 Q. B. D. 481. See Taylor's Law of Evidence, 9th ed. pp. 257, 950, 951 ; Roscoe's Digest of Criminal Evidence, 12th ed. pp. 775-6 ; and Archbold's Criminal Pleading, 22nd ed. p. 867, where the subject is fully discussed and the cases collected.

charges may operate with greater or lesser force with regard to accusations of every kind. Two women were capitally convicted of robbing a young girl named Canning, and afterwards confining her under circumstances of great cruelty for twenty-nine days without sustenance, except a quartern loaf and a pitcher of water. Public odium was intensely excited against the prisoners, and they very narrowly escaped execution, and yet it was clearly ascertained that the charge was a fabrication in order to conceal the prosecutrix's misconduct during the period of her absence from her master's house (*n*). Canning was afterwards convicted of perjury, and sentenced to be transported; and upon her trial thirty-eight witnesses, most of them unconnected with each other, spoke to the identity of one of her unfortunate victims, and proved a circumstantial *alibi* (*o*). Nine persons were convicted on a charge of conspiring to carry off from the house of her guardian, a young lady of seventeen years of age, in order to procure her clandestine marriage with a young man of low condition for whom she had formed an attachment, and with whom she had indulged in vulgar familiarities. She gave her testimony in a manner apparently so artless and ingenuous that she greatly prepossessed the judge, and so favourably impressed the jury that they stopped the prosecutor's counsel when about to reply, and returned a verdict of guilty (*p*). Her story

(*n*) *Rex v. Squires and Wells*, 19 St. Tr. col. 261-275.

(*o*) *Rex v. Canning*, 19 St. Tr. 283 at col. 667; and see Lawrence's *Life of Fielding*, 320.

(*p*) *Rex v. Bowditch and others*, Dorchester Summer Assizes, 1818, *coram* Park, J., Shorthand Rep.

was nevertheless discovered to be a fabrication, for the purpose of extricating herself from the shame of her levity and misconduct, and she as well as a witness who had corroborated her story were afterwards convicted of perjury (*q*). Miscreants, and among them even the inferior ministers of the law, have concocted and procured the commission of robbery and other crimes for the purpose of obtaining the pecuniary rewards formerly given by Act of Parliament for the apprehension and conviction of offenders (*r*).

It is frequently therefore of the highest importance, to investigate the motives of the complainant, and to ascertain whether they are such as may have led to the institution of a false charge. The just course of inquiry in such circumstances was thus laid down by Mr. Justice Coltman. "The jury," he said, "had nothing to do with the prosecutor's motives except so far as, if it should appear that there was any motive for the prosecution of an unworthy character made out, it would then be their duty to watch such a case much more narrowly than one in which no such motive appeared. Even in that case, however, if the evidence satisfied them of the truth of the charge, they had no right to look at the motives that had induced the prose-

(*q*) *Rex v. Whitby*, and *Rex v. Glenn*, K. B. Guildhall, October, 1820.

(*r*) *Rex v. M'Daniel and others*, Foster's Rep. 121; *Rex v. Vaughan and others*, Sessions Papers, 1816; *Reg. v. Delahunt*, Dublin, 1842; cited in Best's Principles of Evidence, 2nd ed. 1855, § 451, p. 533, note (*z*).

cutor to prefer it, but were bound to say that the accused person was guilty" (s).

5. A presumption of innocence may be created by the language, conduct, and demeanour of the party charged with crime : and it is upon this principle that the ingenuous and satisfactory explanation of circumstances of suspicion always operates in favour of the accused. Mr. Justice Erle said he thought it was extremely important, as much for the protection of innocence as for the discovery of guilt, that the accused should have an opportunity of making a statement (t), and the Lord Justice Clerk, Lord Mackenzie, in a Scotch case, said, that the declaration of a prisoner, if fairly given, and founded in truth, often had a very favourable effect (u). It is evident, however, that this kind of presumption must be attended with much uncertainty, and in its application requires the exercise of great

(s) *Reg. v. Coyle*, C. C. C. October Session, 1851. A curious illustration of this remark occurred at Chester Autumn Assizes, 1886. A man was tried for an offence under sect. 5 of the Criminal Law Amendment Act, 1885. The principal witness against him was the mother of the girl, who had caught him in the act, but the transaction had occurred more than a year before. The judge inquired why it was that the charge was not made at the proper time. "I had pity upon him," was the answer, "because he was an orphan." The orphan was forty years of age, and as he had not ceased to be an orphan, further inquiry was made, and it turned out that the prisoner had gone lately to the mother's house and enjoyed her hospitality over a cup of tea. He accidentally cracked a teapot, for which she wanted a shilling from him, which he refused to pay, whereupon the charge was made. It was perfectly true and the prisoner admitted it, but that cracked teapot and his reluctance to pay a shilling cost him some months of imprisonment. *Reg. v. Joseph Roberts*, 27 October, 1886, *coram* Wills, J.

(t) *Reg. v. Baldry*, 21 L. J. M. C. 130.

(u) *Rex v. Wishart*, Syme's Justiciary Rep. App., at p. 22.

circumspection. The deportment of innocence may be simulated, and from the anomalies of human nature, it may be difficult if not impracticable in some cases to determine what is the natural and suitable conduct to be expected from a person influenced by the pressure of an accumulation of circumstances, at once threatening and fallacious. It is certain that innocent persons have drawn upon themselves the punishment of crime by conduct apparently consistent only with guilt, but which has been resorted to as likely to divert or repel unjust suspicion; of which an instructive case is mentioned by Lord Coke (x). "In the county of Warwick," says he, "there were two brethren; the one having issue a daughter, and being seized of lands in fee, devised the government of his daughter and his lands until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age; her uncle for some offence correcting her, she was heard to say, 'Oh! good uncle, kill me not!' After which time the child, after much inquiry, could not be heard of, whereupon the uncle, being suspected of the murder of her, the rather for that he was her next heir, was upon examination, anno 8 Jac. Regis, committed to the gaol for suspicion of murder; and was admonished by the justices of assize to find out the child, and thereupon bailed him until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, took another child as like unto her both in person and years as he could

(x) Coke's 3rd Inst., c. 104, p. 232.

find, and apparelled her like unto the true child, and brought her to the next assizes ; but upon view and examination she was found not to be the true child ; and upon these presumptions he was indicted and found guilty, had judgment, and was hanged. But the truth of the case was, that the child, being beaten overnight, the next morning, when she should go to school, ran away into the next county ; and being well educated was received and entertained of a stranger ; and when she was sixteen years old, at which time she should come to her land, she came to demand it, and was directly proved to be the true child. Which case," the learned author adds, "we have reported for a double caveat ; first to judges, that they in case of life judge not too hastily upon bare presumption, and secondly to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself as the uncle did." From the foregoing considerations it follows that our judgments in regard to the conduct of parties under accusation for crime must occasionally be modified by allowances for human weakness and inconsistency, which can in no degree be admitted as qualifying the obligation of entire truthfulness and consistency justly exacted from those who voluntarily become the accusers of others.

6. Since an action without a motive would be an effect without a cause, a presumption is consequently created in favour of innocence from the absence of all apparent inducement to the commission of the imputed offence. But the investigation of human

motives is often a matter of great difficulty, from their latency or remoteness; and experience shows that aggravated crimes are sometimes committed from very slight causes, and occasionally even without any apparent or discoverable motive. This particular presumption would therefore seem to be applicable only to cases where the guilt of the individual is involved in doubt; and in such cases juries are apt to attach considerable importance to motive. Where a nurse was charged with the murder of a woman by poison, it was shown that the deceased and two other members of the family had died of strychnine and morphia while under the prisoner's care: that the prisoner had access to both these poisons, and that the attacks and death followed on the patient receiving food or medicine from her. No motive could be suggested, and the jury found that the prisoner had administered morphia to the deceased, but with what intent there was no evidence to show. She was acquitted (*y*). The question of intent is, however, seldom raised in so direct a form, and it is still less often that such a verdict is likely to be returned. It would look as if the jury in the case mentioned had confounded intention with motive. As a general rule, if a person commits an act wrong in itself, and of which the mischievous consequences are perfectly well known, it is a safe conclusion and one generally

(*y*) *Reg. v. Wilmot*, Leeds Winter Assizes, 1881, *coram* Manisty, J. See *Times*, Feb. 10th and 11th; *cf.* the charge of Abbott, J., in *Rex v. Donnell*, Frazer's Shorthand Rep., p. 130, referred to at length, pp. 331-336, *infra*. As to the distinction between motive and intention, see p. 45, *supra*.

adopted by reasonable people that he intended that those consequences should follow. If so, it is immaterial what the motive was, or whether there was any motive at all. It is conceivable that a man might kill another deliberately and intentionally because he thought it better on the whole, either for the victim himself or for society at large, that he should die rather than live. Such a motive would not save the slayer from conviction, nor would necessarily the mere absence of an assignable motive.

7. An accused person's motives, even where they are unquestionably of a criminal character, may nevertheless be susceptible of different interpretations, and indicative of very different degrees of moral and legal turpitude. Concealment of the death of an illegitimate child and the clandestine disposal of its body, for instance, may be accounted for either by a purpose to suppress evidence of a murder, or merely by the desire of preserving the reputation of female chastity. Where a woman was indicted jointly with her husband for receiving stolen property knowing it to have been stolen, and it appeared that she had dealt with it and ultimately destroyed it, it was held to be a question for the jury whether she had so received and dealt with it to aid him in turning it to profit, or merely to conceal his guilt or screen him from the consequences (z). So where a wife attempted to break up coining implements at the time of her husband's apprehension, it was held that if done with the object of screening him, it was no evidence of a guilty

(z) *Reg. v. M<sup>c</sup>Clarens*, 3 Cox, C. C. 425 ; and *Reg. v. Brook*, 6 *ib.* 148.

possession by her (a). And where a man and his wife were found guilty of wounding a person with intent to disfigure him and to do him grievous bodily harm; but the jury found that the wife acted under the coercion of the husband and did not personally inflict any violence on the prosecutor; it was held by the Court for the consideration of Crown Cases Reserved that the conviction against the wife could not be supported (b). In all such cases, every sound principle of interpretation and judgment requires, that in the absence of contrary proof, the act shall be referred to the operation of the least guilty motive; conformably to the maxim, *præsumptio judicatur potentior quæ est benignior* (c). Of this evident principle of justice the statute 21 Jac. I. c. 27 (now happily expunged from our code), which made the concealment of the death of an illegitimate child by its mother, a conclusive presumption of murder, unless she could make proof by one witness at least that the child was born dead, was a flagrant violation. It is on this principle that, when a special intent is made by statute an essential ingredient of any offence, as in the cases of assault with intent to murder or to rob, or to commit a felony, or to prevent lawful apprehension or detainer, such special intent must be proved by direct evidence or by circumstances which necessarily or reasonably lead to the inference of such intention. Thus a charge of the statutable offence of throwing upon or

(a) *Reg. v. Boober*, 4 Cox, C. C. 272.

(b) *Reg. v. Smith and wife*, 27 L. J. M. C. 204.

(c) Menochius, De Præsumptionibus, lib. v. pr. 29—another way of saying that guilt must be proved. Maxims, if unimpeachable, are seldom much more than truisms.

otherwise applying to any person any corrosive fluid or other destructive matter, with intent to burn, maim, or do some bodily harm, is not sustained by proof of throwing a corrosive fluid for the purpose of burning the clothes (*d*). And on the trial of a man for throwing a stone at a railway carriage with intent to endanger the safety of the passengers, where it appeared that the prisoner threw a stone just as the train was setting off, at a passenger against whom he had been much excited, Mr. Justice Erle told the jury that they must be satisfied that the intent was to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with intent to do grievous bodily harm; but that, as that is a question of degree, which it is impossible to define further than in those terms, the jury must decide upon the facts, whether there had been such an intent (*e*).

8. The *primâ facie* presumption in favour of innocence from the absence of all apparent motive, is greatly strengthened where all inducement to the commission of the imputed crime is opposed by strong counteracting motives; as where a party indicted for arson with intent to defraud an insurance office had furniture on the premises worth more than the amount of his insurance (*f*), or where a party accused of murder had a direct interest in the continuance of the life of the party supposed to have been

(*d*) *Reg. v. Coppard*, Kingston Winter Assizes, 1855, *coram* Crompton, J.; and see *Rex v. Woodburne and Coke*, p. 54, *supra*.

(*e*) *Reg. v. Rooke*, 1 F. and F. 107.

(*f*) *Rex v. Bingham*, Horsham Spring Assizes, 1811.

murdered (*g*). *A fortiori* would this presumption seem to apply where the life of the suspected party has been endangered, as the consequence of the supposed criminal act; as where a party charged with murder by poisoning had herself partaken of the poisoned food (*h*): but this circumstance, of apparently favourable presumption, may have been resorted to as an artifice to avert suspicion, especially if the quantity taken has not been sufficient seriously to endanger life (*i*).

9. Since falsehood, concealment, flight, and other like acts, are generally regarded as indications of conscious guilt, it naturally follows that the absence of these marks of mental emotion, and still more a voluntary surrender to justice, when the party had the opportunity of concealment or flight (*k*), must be considered as leading to the opposite presumption; and these considerations are frequently urged with just effect, as indicative of innocence; but the force of the latter circumstance may be weakened by the consideration that the party has been the object of diligent pursuit (*l*), or that, as said by Lord Campbell, though he may have abstained from flight from a sense of innocence, he may have done so from thinking that, from the course he had taken, nothing would be discovered against him (*m*). It

(*g*) *Rex v. Downing*, pp. 240-242, *infra*.

(*h*) *Reg. v. Hawkins*, Stafford Summer Assizes, 1839.

(*i*) *Rex v. Wescombe*, and *Rex v. Nairn and Ogilby* (19 St. Tr. col. 1284), p. 122, *supra*; and see *Rex v. Fenning*, p. 295, *infra*.

(*k*) Menochius, De Præsumptionibus, lib. v. pr. 48.

(*l*) *Rex v. Glen*, Syme's Justiciary Report, at p. 277.

(*m*) *Reg. v. Palmer*, Shorthand Report, at p. 310. See p. 344, *infra*.  
It must also be borne in mind that at the present day, with extradition

must be also remembered, that flight and other similar indications of fear may be referable, not to the precise offence charged but to other circumstances, as to disordered affairs (*u*), or to guilt of another and less penal character than that involved in the particular charge (*o*). This view was urged, but without success, in the case above mentioned of the Goat Fell murder, where the prisoner's flight and the concealment of the body were undoubtedly grave inculpatory presumptions (*p*).

10. As is the case with other presumptions, so the inference of guilt from the recent possession of stolen property may be rebutted by circumstances which create a counter-presumption: as where the property is found in the prisoner's possession under circumstances which render it more probable that some other person was the thief. Therefore, where, on the trial of a mother and her two sons for sheepstealing, it was proved that the carcass of a sheep was found in the house of the mother, it was considered that the presumption arising from the possession of the stolen property immediately after the theft was rebutted so far as respected her, by the circumstance that *male* footsteps only were found near the spot from which the sheep had been

treaties covering almost the whole of the civilized world, permanent escape is extremely difficult.

(*n*) *Rex v. Crossfield*, 26 St. T. at col. 217.

(*o*) *Rex v. Schofield*, 31 St. Tr. at col. 1061; and see the language of Tindal, L. C. J., in *Rex v. Frost*, Gurney's Rep. 766; and of the Lord Justice Clerk Boyle, in *Rex v. Hunter and others*, Court of Justiciary, Jan. 1838, Shorthand Report, 368.

(*p*) *R. v. Laurie*, *supra*, p. 119.

stolen (*q*). A woman was tried for the larceny of five saws which had been stolen from the workshop of a hat-block turner during the night. There was a hole in the building large enough for a person to have crept through it. On the following day she pledged two of the saws with a pawnbroker in the neighbourhood. On the following night, the house of the prosecutor was broken open and a number of articles stolen. No communication existed between the house and the workshop. Two days afterwards the prisoner was taken into custody in the house of a man who was himself charged with having committed the burglary. Mr. Baron Gurney said it was improbable that the female should have taken these saws (*r*), but that it was extremely probable that she should have been employed by another person to pawn them, that it was hardly a case in which the general rule could apply, and that it would be safer to acquit the prisoner (*s*). Circumstances of conduct also may repel this *primâ facie* presumption; as where the prisoner a few days after the robbery of a large quantity of plate in London, sold, to a dealer in gold and silver, some silver articles marked with the prosecutor's crest partially obliterated, which had formed part of the stolen property. Mr. Baron Bramwell said it was a circumstance in the prisoner's favour that he had disposed of the silver at a place where he had been

(*q*) *Rex v. Arundel and others*, 1 Lewin, C. C. 115.

(*r*) Women commit burglary and housebreaking but seldom, though cases of both offences committed by women are probably within the experience of every judge who has been for some years on the bench.

(*s*) *Rex v. Collier*, 4 Jurist, 703.

known for several years and had been in the habit of bringing gold and silver for sale, and did not appear to have made any attempt at secrecy. The prisoner was acquitted (*t*).

11. Circumstances of apparently the most unfavourable presumption may be susceptible of an explanation consistent with the prisoner's innocence, and really be irrelevant to the particular inference sought to be derived from them (*u*); or they may be opposed by circumstances which weaken or neutralize, or even repel, the imputed presumption, and induce a stronger counter-presumption (*u*). In all such cases, justice demands that dispassionate and candid consideration be given to the alleged circumstances of explanation or rebuttal. On the trial of a shoemaker for the murder of an aged female, it appeared that his leathern apron had several circular marks made by paring away superficial pieces, which it was supposed had been removed as containing spots of blood, but it was satisfactorily proved that the prisoner had cut them off for plasters for a neighbour (*x*). A policeman on his examination before the Coroner, where the question was, whether a young woman had been murdered or had committed suicide, swore that a piece of rope found in the prisoner's box appeared to have been cut from the same piece that was round the neck of the deceased; but on the trial he acknowledged that he had been

(*t*) *Reg. v. Benjamin*, C. C. C., June, 1858.

(*u*) *Rex v. Thornton*, pp. 244-249, *infra*; *Rex v. Looker*, pp. 242-244, *infra*; *Reg. v. Pook*, pp. 250-252, *infra*; *Reg. v. Franz*, pp. 252-255, *infra*.

(*v*) *Rex v. Fitter*, Warwick Summer Assize, 1834, *coram* Taunton, J.

mistaken ; the two pieces of rope had in the interim been examined by a rope-maker, and were found not to correspond, one piece being twisted to the right and the other to the left (y). The prisoner was convicted upon the general evidence, and executed. Two men were tried for killing a sheep with intent to steal the carcass. The prosecutor had three sheep on a common, on the 14th of December, on which evening the prisoners, one of whom had a gun, were seen near the common driving several sheep before them. One of the witnesses, when near the prosecutor's house, heard the report of a gun in the direction of the common, and, having a suspicion of the object of the prisoners, went to the prosecutor's house and communicated his suspicion, in consequence of which the prosecutor and the witness went to the common on which the sheep had been left feeding, and discovered that one of them was not there. The prisoners were apprehended the same night at their respective homes. In the lodgings of one of the prisoners a gun was found which had been recently fired, and some shot and powder wrapped in a piece of newspaper, from which two small pieces had been torn ; and upon the person of the other prisoner, a knife was found discoloured with blood. No traces were found of the lost sheep at that time, but the next day the carcass was found, concealed by fern, on the common ; the sheep had been shot and also stuck in the neck. Two days afterwards, on searching near the spot where the carcass was found, two small pieces of

(y) *Reg. v. Drory, coram* Lord Campbell, L. C. J., Chelmsford Spring Assizes, 1851.

newspaper were discovered, singed and bearing marks of having been fired from a gun, which on comparison were found to be the identical pieces so torn from the paper in question. Notwithstanding these apparently conclusive circumstances, the jury acquitted the prisoners, as it appeared from the cross-examination of one of the witnesses that he had seen them shooting on the common on the previous Sunday (z). A man was tried for murder on Horwich Moor, under circumstances which were extremely suspicious; but the presumption against him was greatly weakened, if not entirely destroyed, by the circumstance that six shots extracted from the deceased's brain all corresponded in weight with the shot known as No. 3, while the shot in the prisoner's bag contained a mixture of Nos. 2 and 3, and the charge in his gun was found to contain the same mixture (a). The value of such exculpatory facts will perhaps be well illustrated by a case of an opposite kind. A gamekeeper had been murdered on Margam Moor, near Swansea. A formidable piece of evidence against the prisoner (who was convicted and executed) was that two or three hundred yards from the body of the deceased was found a gun, a powder-flask, and a pouch, carefully hidden in a ditch by the side of a wall. There could be no doubt that all three were hidden at the same time and by the same person. The gun was conclusively shown to have been taken by the prisoner from the

(z) *Reg. v. Courtnage and Mossingham*, Winchester Spring Assizes, 1843, *coram* Atcherley, Serjt.

(a) *Reg. v. Whittall*, Liverpool Spring Assizes, 1839, *coram* Alderson, B.

house in which he was lodging some two or three hours before the murder was committed; this interval affording ample time for him to have reached the scene of the murder. In close proximity to the body were found 23 shots—one, No. 6, by itself, the other 22 in a pool of blood close to the body, ranging from BB. to No. 7. The pouch contained a quantity of shot ranging from BB. to No. 8. It was shown that such a mixture of shot is extremely rare; poachers frequently using mixed shot, but very seldom of more than two or three sizes (*b*).

A druggist's apprentice was tried for the murder by prussic acid of a female servant who was pregnant by him, and the case was one of much suspicion; but there was a strong counter-presumption from the fact that the deceased had made preparations for a miscarriage on the very night in question (*c*).

A man was tried for the murder of a girl in Poole Harbour; the evidence raised a very strong presumption that he had wilfully pushed her over the quay side into the water after a quarrel, but its effect was greatly weakened by the fact that the woman's shawl, hat, and brooch were found laid carefully upon a post, which was more consistent with suicide than murder, and the prisoner was acquitted (*d*). In a case referred to hereafter, evidence of identity of

(*b*) *Reg. v. Joseph Lewis*, Swansea Sum. Ass., 1898, *coram* Wills, J.

(*c*) *Reg. v. Freeman*, Leicester Spring Assizes, 1839, *coram* Best, L. C. J.; and see *Rex v. Barnard*, 19 St. Tr. 815.

(*d*) *Reg. v. Tramy*, Dorchester Assizes, 1868, *coram* Mellor, J. See *Times*, July 23rd, 1868.

a foreigner as the murderer of an old woman at Kingswood, of a singularly cogent character, was satisfactorily explained away by the fact that another foreigner had stolen his bag with his clothes and papers, and by other exceptional coincidences (*e*).

12. Nor must it be overlooked, as one of the sources of error and fallacy in these cases, that circumstances of adverse presumption, apparently the most conclusive, have been fabricated by the real offender, in order to preclude suspicion from attaching to himself, and to cause it to rest upon another; as where a party was convicted upon an indictment for privily conveying three ducats into the prosecutor's pockets, with intent to charge him with having robbed him of the same (*f*); or where an offender surreptitiously put on the shoes of

(*e*) *R. v. Franz*, pp. 252-255, *infra*.

(*f*) *Rex v. Simon*, 19 St. Tr. 680. The last edition of the present work states that upon a new trial the defendant was acquitted. The report in the State Trials show that a new trial was had. The case was tried at the Assizes for Essex before a special jury. It must therefore have been removed by *certiorari* into the King's Bench. The charge was that of a misdemeanour, so that a new trial was a possibility. The report, however, stops with the statement that the new trial took place on the 12th July, 1752, without mentioning the result. The Editor has been unable to verify the fact of acquittal. It may, however, have been taken from a publication called "Ashley's Case and Appeal." Ashley was the prosecutor on the first trial. His attorney had committed some serious irregularities in getting the original warrant backed, and the arrest under it was illegal. Simon brought an action against Ashley and the officers who made the arrest. The action was tried at the Guildhall on the 9th July, 1752—just three days before the second criminal trial was had—and resulted in a verdict for Simon for £200. A note at col. 692 of 19 St. Tr. quotes from "Ashley's Case and Appeal," but the Editor has not been able to find the publication. The result of the second trial of Simon is probably to be found in it.

another person while engaged in the commission of crime, in order that the impressions might lead to the inference that the crime was committed by the owner of the shoes (*g*).

13. In forming a judgment as to a prisoner's intention, evidence that the party has previously borne a good character is often highly important, and if the case hangs in even balance, should make it preponderate in his favour (*h*). But if the evidence of guilt be complete and convincing, testimony of previous good character cannot and ought not to avail (*i*). The reasonable operation of such evidence is to create a presumption that the party was not likely to have committed the act imputed to him; which presumption, however weighty in a doubtful case, cannot but be unavailing against evidence which satisfactorily establishes the fact.

Evidence of character must of course be applicable to the particular nature of the charge; to prove, for instance, that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty. The correct mode of inquiry is as to the *general* character of the accused. Witnesses as to character must not give evidence of particular facts, or of their own

(*g*) See the case of *François Mayenc*, *supra*, p. 178; and see other such cases in Wharton's Criminal Law of the United States, Ch. II., sec. 7.

(*h*) *Per* Lord Ellenborough, L. C. J., in *Rex v. Davison*, 31 St. Tr. 217; and see the language of Tindal, L. C. J., in *Reg. v. Frost*, Gurney's Rep. 749.

(*i*) *Ibid.*, and *Rex v. Haigh*, 31 St. Tr. 1122.

opinions, but only as to the *general reputation* which the accused bears (*k*). The prosecutor is not allowed to adduce evidence of a prisoner's bad character in order to prove that he committed, or was likely to commit, the offence charged. It has been said that such evidence is irrelevant and calculated to lead the mind to a collateral issue (*l*). But the truth is that this part of our law is an anomaly. Logically speaking, an antecedent bad character would form quite as reasonable a ground for the presumption of guilt as previous good character for the presumption of innocence. The practice of refusing to admit evidence on the part of the prosecution of a prisoner's bad character, and of allowing evidence of good character to be given, grew up from a desire to administer the law with mercy at a time when it was felt to be too severe (*m*). Indeed these rules are the result of policy and humanity rather than of any scientific considerations as to the strict relevancy of the evidence in question (*n*). In the text-books of the Civil Law, much stress is laid upon *mala fama*, and in Scotland habit and repute is an admitted aggravation

(*k*) *Reg. v. Row'ou*, 10 Cox, C. C. 25; 34 L. J. M. C. 57. But in *Rex v. Davison*, 31 St. Tr., col. 211, Lord Ellenborough, L. C. J., admitted evidence of individual opinion as to prisoner's character and only stopped the statement as to particular facts.

(*l*) Evidence of an admission by the accused that he was addicted to the commission of the particular offence charged was rejected as irrelevant in *Rex v. Cole*, Best on Presumptions, p. 212.

(*m*) The frequency of capital punishment in old times has to answer for many anomalies and not a few mischievous subtleties and refinements in English criminal law.

(*n*) See per Cockburn, L. C. J., and Willes, J., in *Reg. v. Rowton*, note (*k*), *supra*.

in charges of theft (*o*), but there are not wanting exemplifications of the danger of permitting the influence of such evidence.

If, however, the presumption arising from the evidence of previous good character be set up by the prisoner, it is then competent to neutralize its effect by the cross-examination of his witnesses, either as to particular facts (*p*), or as to the grounds of their belief (*q*) for the purpose of discrediting their testimony; it is even competent to repel such evidence by calling witnesses to give evidence of the prisoner's general bad character, though such a course would be somewhat unusual (*r*). Thus where a prisoner was indicted for a highway robbery, and called a witness who deposed to having known him for years, during which time he had borne a good character, it was permitted to ask the witness on cross-examination whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighbourhood some years before; Mr. Baron Parke said, that "the question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character," added the learned judge, "is made up of a number of small circumstances, of which his being suspected of misconduct is one" (*s*); but

(*o*) 1 Dickson's Law of Evidence in Scotland, vol. i., § 30, pp. 22, 23.

(*p*) *Reg. v. Hodgkins*, 7 C. & P. 298.

(*q*) Taylor's Law of Evidence, 9th ed., 1895, p. 250.

(*r*) *Reg. v. Rowton*, 10 Cox, C. C. 25; 34 L. J. M. C. 57 (overruling *Reg. v. Burt*, 5 Cox, C. C. 284).

(*s*) *Rex v. Wood*, 5 Jurist, 225; and Best on Pres. p. 215.

Mr. Justice Erle refused to permit the cross-examination of a witness to character as to circumstances of suspicion against the prisoner which occurred upon the same day as the alleged offence was committed (*t*).

As a general rule, neither the prosecutor nor the prisoner can enter into evidence as to *particular facts* of good or bad conduct: but an exception to the rule was created by statute 6 & 7 William IV. c. 111, which enacts that, if upon the trial of any person for any subsequent felony, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such prisoner for the previous felony; and that the jury shall inquire of the previous conviction and subsequent offence at the same time; and this provision has been extended by St. 14 & 15 Vict. c. 19, s. 9 (*u*), to many misdemeanours. The statutes equally apply where the evidence of good character is obtained by the prisoner's counsel on the cross-examination of the witnesses for the prosecution (*x*). These rules have been carefully preserved by the Criminal Evidence Act, 1898 (*y*), which, while introducing the great modern change of allowing every accused person to give evidence on his own behalf, provides that a person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any

(*t*) *Reg. v. Rogan and Elliott*, 1 Cox, C. C. 291.

(*u*) See now the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 116), and 24 & 25 Vict. c. 99, s. 37, as to coinage offences.

(*x*) *Reg. v. Shrimpton*, 3 C. & K. 373.

(*y*) 61 & 62 Vict. c. 36, s. 1 (*f*).

question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution ; or (iii.) he has given evidence against any other person charged with the same offence.

14. Of all kinds of exculpatory defence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. While the foregoing considerations are more or less of an argumentative and inconclusive character, this defence, if the element of time be definitely and conclusively fixed, and the accused be shown to have been at some other place at the time, is absolutely incompatible with, and exclusive of, the possibility of the truth of the charge. "It must be admitted," says Sir Michael Foster, "that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution ; but if it appeareth to be founded in truth, it is the best negative evidence that can be offered : it is really positive evidence, which in the nature of things necessarily implieth a negative ; and in many cases

it is the only evidence an innocent man can offer" (z).

It is obviously essential to the proof of an *alibi* that it should cover and account for the whole of the time of the transaction in question, or at least for so much of it as to render it impossible that the prisoner could have committed the imputed act; it is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed, and the place at which the accused is alleged by the defence to have been is not far off, the question then becomes one of opposing probabilities. A defence of an *alibi* was therefore disregarded, because all that the prisoners offered to prove was that they were in bed on the night in question at twelve o'clock, and were found in bed next morning, after the arson with which they were charged had taken place, the distance being two miles, so that they might have risen, committed the deed, and returned to bed (a). On the trial of a man for the murder of a young woman under circumstances of the strongest adverse presumption, the proof was that the deceased had been murdered at her father's cottage in the forenoon of the day in question, and the prisoner alleged that he was at work the whole of that day with his fellow-labourers at a distance from the cottage: but it turned out that he had been absent from his work about half-an-hour, an interval sufficiently long to have enabled

(z) Foster's Discourses on the Crown Law, p. 368; and see the observations of George, B., in *Rex v. Brennan*, 30 St. Tr. col. 79.

(a) *Rex v. Fraser*, Alison's Principles of the Criminal Law of Scotland, vol. ii., p. 625.

him to reach the cottage, commit the murder, and rejoin his fellow-workmen. He was convicted, and before his execution confessed his guilt (*b*)

The credibility of an *alibi* is greatly strengthened if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. These conditions were remarkably fulfilled in the memorable case of Abraham Thornton, of which a full account will be given hereafter. To all appearance the guilt of the prisoner was the necessary conclusion from the supposed inculpatory facts, and yet he had been seen by a number of independent and unimpeachable witnesses at such a distance from the scene of the alleged murder, at the very time when it must have been committed, if at all, as to render it physically impossible that the deceased could have been murdered by him; and all the facts supposed to have been the conclusive indications of guilt were satisfactorily explained by collateral circumstances, and by a different hypothesis (*c*).

On the other hand, it is a material circumstance to lessen the weight of this defence, if it be not resorted to until some time after the charge has been made (*d*), or if nothing happened immediately

(*b*) *Rex v. Richardson*, pp. 384-389, *infra*, and *R. v. Muller*, C. C. C. Oct. 27, 1864.

(*c*) *Rex v. Thornton*, pp. 244-249, *infra*; and see *Rex v. Canning*, 19 St. Tr. 283, where the prosecutrix of a capital charge was convicted of perjury on the evidence of thirty-eight witnesses who proved an *alibi* (see p. 209, *supra*).

(*d*) See pp. 85-87, *supra*.

after the transaction to lead the witnesses to watch so as to be accurate with respect to the hour or time to which they speak, even supposing them to depose under no improper bias or influence (*e*); or if having been once resorted to, a different and inconsistent defence is afterwards set up. There are many other sources of fallacy connected with this particular defence; such as mistake as to the person from want of opportunity of accurate observation,—or other causes of misconception,—the possible difference of clocks (*f*), or the fraudulent alteration of them to tally with other facts; as where one of the perpetrators of a murder hastened home, put back the clock two hours, and went to bed; and shortly afterwards awoke his servant, and told her to go down-stairs and see what was the time, which she did, not knowing that the clock had been tampered with; so that her testimony led to his acquittal (*g*).

A group of irrelevant facts is sometimes artfully arranged so as to give an appearance of reality and coherence to the defence, the facts being true in themselves, but fraudulently referred to the critical day or time, instead of to the real time of their occurrence (*h*); or such a misstatement may take

(*e*) *Per Le Blanc, J.*, in *Rex v. Mellor and others*, 31 St. Tr. 1032; and see *Rex v. Haigh, ib.* 1118; and the observations of Shaw, C. J., in *Professor Webster's case*, Bemis's Rep., at p. 478; see p. 109, *supra*.

(*f*) *Rex v. Schofield*, 31 St. Tr. 1063; *Rex v. Mellor, ib.* 1027.

(*g*) *Rex v. Hardy*; see *Times* of the 28th November, 1857, where it is stated that one of the murderers made a circumstantial confession on his death-bed.

(*h*) See a case of this kind in 8 Lond. Med. Gaz. 36.

place by unintentional mistake (*i*). In an American case, where several persons were tried for an atrocious murder, it appears to have been a part of the plot for each of the prisoners to sleep on the night of the murder with some one who could testify to an *alibi*. One of the murderers had requested a man to sleep in his house; but the witness stated that he might have been absent while he was asleep. Another of them went several miles from the place of the murder to sleep, and the person in whose house he stayed had no doubt that he was within-doors the whole night. Two others of them went to a tavern several miles from the scene of the murder, and went to bed together; but in the night one of them was discovered leaving the house, although he evidently wished to be unnoticed; and he was absent so long, not returning until the morning, as to alarm the tavern-keeper, who with his wife made diligent search for him in the neighbourhood, but his bed-fellow manifested no anxiety or alarm, and got up and assisted in the search (*k*).

This defence is especially easy of fabrication or mistake in regard to the essential element of time, where a few minutes may be of vital moment; and the unblushing effrontery with which witnesses sometimes present themselves to speak to time, without regard to plausibility or consistency, is truly surprising. On a trial for murder, two witnesses who were called to support a defence of an *alibi* swore that they were able to speak positively to the

(*i*) *Rex v. Baines*, 31 St. Tr. 1091; *Rex v. Haigh*, *ib.* 1118.

(*k*) Case of *Bauer and others*, 2 Chandler. Amer. Cr. Tr. 3,56.

time, from having looked at a clock ; but upon being required by the counsel for the prosecution to tell the time by the clock in court, after some hesitation admitted that they were unable to do so (*l*). In another case it was elicited in cross-examination of a woman with whom the prisoner lived, that on his return home after an absence of an hour, during which he committed two murders, he told her to say that he had not been out more than ten minutes (*m*).

Wherever pertinent and material evidence by which an *alibi* might, if true, have been supported, is withheld (*n*), or the defence fails of being supported by credible and sufficient evidence, or is detected to be the result of afterthought or contrivance, or is contradicted, or otherwise rebutted, the attempt to set it up recoils with fatal effect upon the party who asserts it ; and often, in the language of a learned judge on the Irish bench, “amounts to a conviction” (*o*).

“The truth of this sort of defence,” said Mr. Baron George, “is not always to be ascertained by the direct testimony of the witnesses called to prove it. Several witnesses are seldom produced in such cases without its being known that they agree with each other in the substantial and principal fact they are to relate ; and as in general it is not to be expected that a prosecutor should come with evidence prepared to meet this sort of defence, the usual test

(*l*) *Reg. v. Cane and others*, C. C. C., June 20, 1851.

(*m*) *Reg. v. Rush*, Norfolk Spr. Ass. 1849.

(*n*) *Rex v. Haigh and others*, 31 St. Tr. 1118 ; *Reg. v. Hunter and others*, Court of Justiciary, Jan. 1838, Shorthand Report, p. 365.

(*o*) *Per* Daly, B., in *Rex v. Killen*, 28 St. Tr. 1085.

of its truth or of its falsehood, where they are unknown to the jury, is a cross-examination of the witnesses, kept asunder, and fairly conducted under the eye and observation of the jury; and here differences or contradictions, otherwise trivial, become important in showing the truth or falsehood of such narrative" (*p*). In such circumstances, if the story be a fabrication, it is obviously far more easy for the witnesses to agree on the mere general fact of the prisoner's presence at the time and place referred to, than on the minute surrounding particulars (*q*).

The foregoing examples suffice to illustrate the subject of exculpatory presumptions; but it is obvious that as inculpatory facts are infinitely diversified, exculpatory facts must admit of the same extent of variety, and that they may be of every degree of force (*r*). In all such cases of conflicting presump-

(*p*) *Rex v. Brennan*, 30 St. Tr. 79.

(*q*) *Reg. v. Hunter*. See note (*n*), p. 235, *supra*. When the Editor first joined the Midland circuit in the spring of 1852, Nottingham enjoyed an unenviable notoriety as a place where manufactured *alibis* flourished. The late Lord Chief Justice Jervis presided in the Crown Court at Nottingham on that circuit, and after having torn a false *alibi* to pieces by a most acute cross-examination, told the jury that each county he went into had its own crop, and that the special crop of the county of Nottingham appeared to be *alibis*. Mr. M. D. Hill, the very learned and able first Recorder of Birmingham, once defended a man at Nottingham who was acquitted on evidence of an *alibi*. He afterwards sought Mr. Hill and confessed to him that the *alibi* was a fabricated one, and described to him two methods by which *alibis* were got up, either of which was difficult of detection. They are as present to the Editor's recollection as when he heard the story from Mr. Hill's lips, but he hesitates to put into print anything which could help to suggest the means of success in such an enterprise.

(*r*) *Traité de la Preuve*, par Mittermaier, ch. 56.

tions it is the duty of the jury, with the assistance of the Court, to weigh and estimate the force of each several circumstance of presumption, and to act upon what appear to be the superior probabilities of the case ; and if there be not a decided preponderance of evidence to establish the guilt of the party, to take the safe and just course, by abstaining from pronouncing a verdict of guilt, where the necessary light and knowledge to justify them in so doing with the full assurance of moral certainty, is unattainable.



## AMERICAN NOTES.

[NOTE TO CHAPTER V.]

### *Conclusions Exculpatory Presumptions.*

“Conclusive presumptions of law are also made in respect to infants and married women. Thus, an infant under the age of seven years is conclusively presumed to be incapable of committing any felony, for want of discretion; and, under fourteen, a male infant is presumed incapable of committing a rape. A female under the age of ten years is presumed incapable of consenting to sexual intercourse. Where the husband and wife cohabited together, as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity, and if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed that she acted under his coercion, and consequently without any guilty intent.” Greenleaf on Evid., 16 ed. § 28.

### *Presumption of Coercion by Husband.*

Where a wife was accused of being accessory to a murder by her husband, proof that she tried to conceal the crime and to divert suspicion from her husband was held not to overcome the presumption that she had acted under her husband's compulsion if she had any part at all in the crime. *State v. Kelly*, 74 Iowa, 589.

### *Presumption that a Husband has Affection for his Wife.*

It is to be presumed, there being no evidence to the contrary, that a husband loves and will protect his wife. So if one is accused of wife murder, he can claim the benefit of not only the ordinary presumption of innocence, but of the equally favorable presumption arising from the marital relation. *State v. Moxley*, 102 Mo. 374.

To rebut this presumption, the prosecution may introduce any evidence showing an alienation of affection and a desire to be rid of the burdens and duties of the relation. So acts and declarations may be given in evidence indicating that the accused regarded his spouse with feelings of unkindness, hatred, or contempt. *State v. Cole*, 63 Iowa, 695; *People v. Hendrickson*, 1 Parker Crim. (N. Y.) 406; *Mack v. State*, 48 Wis. 271.

So the accused may be shown to have made an unsuccessful attempt to get his spouse to consent to a divorce (*State v. Jones*, 3 S. E. 507); or to have failed to obtain the pecuniary advantage which he had expected from the marriage (*People v. Hendrickson*, 1 Parker Crim. (N. Y.) 406); or to have been guilty of adultery during the life of the deceased spouse. *State v. Watkins*, 9 Conn. 47; *Wharton v. State*, 73 Ala. 366.

The State may repel the presumption of conjugal affection by proof that the marriage with deceased was bigamous and that defendant immediately married a third woman (*State v. Green*, 35 Conn. 203), and by proof that defendant showed indifference as to his wife's death. *People v. Greenfield*, 23 Hun, 454; affirmed 85 N. Y. 75.

Where a husband is charged with cruelty or violence towards his wife, there is a legal presumption of his innocence, arising from their relation, and the mutual affection by which it is commonly accompanied. *State v. Green*, 35 Conn. 205.

#### *Presumption of Innocence.*

In Greenleaf on Evidence, § 34, it is said: "Thus, as men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence to the benefit of which the party is entitled." See also *Coffin v. U. S.*, 156 U. S. 432. But the statement that the presumption of innocence is to be regarded as evidence is very generally disapproved and is wholly illogical. See *State v. Smith*, 65 Conn. 283; *Agnew v. U. S.*, 165 U. S. 36; Thayer, Prelim. Treatise on Evid., p. 551, and Wigmore's note to § 34, Greenleaf on Evid., 16th ed.

The presumption that life continues relieves the prosecution of

the necessity of introducing evidence to show that life continued to exist up to the moment of the fatal blow. The presumption of innocence does not overcome the foregoing presumption. "The prisoner's child was seen alive in her arms, at half-past six o'clock in the morning, healthy and vigorous; and at eleven at night it was found dead, with marks of suffocation on its person. The presumption then is, that it was alive when these marks were impressed." *Com. v. Harman*, 4 Pa. St. 269, 273.

Where defendant was charged with the murder of his daughter, the jury should be charged that innocence is presumed, but not that the law presumes an affection for one's child. *Hawes v. State*, 88 Ala. 37.

The presumption of innocence casts the burden of proving guilt upon the State, but it does no more. While it calls for evidence from the State, it is not itself evidence for the accused. *State v. Smith*, 65 Conn. 283.

#### *Self-Defence in Homicide.*

The accused may show the imminence of danger to himself from the deceased, and likewise his apprehension of danger.

In *Duncan v. State*, 84 Ind. 204, he was allowed to testify that he believed his life to be in danger. *State v. Collins*, 32 Iowa, 36; *Williams v. Com.*, 90 Ky. 596 (where such belief was admitted after proof that deceased had pointed a gun at defendant). See *Com. v. Crowley*, 165 Mass. 569; *contra*, as to defendant's belief and apprehensions, *State v. Gonce*, 87 Mo. 627.

The conduct of the deceased at the time of the homicide may be proved to support the claim of self-defence on the part of the accused. *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Williams v. People*, 54 Ill. 422; *Frody v. State*, 67 Tenn. 349.

The manner in which the deceased advanced upon the defendant may be shown. *Frody v. State*, 67 Tenn. 349.

The defendant may show that deceased made a vicious assault upon another just prior to the homicide, but he cannot show that such other person's nerves and mind were permanently injured. *State v. Sorenson*, 32 Minn. 118; 19 N. W. 738.

The defendant in homicide may show that the deceased said

before death, "I would have gotten him if he had not been too quick for me," as tending to prove self-defence. *Brown v. State*, 74 Ala. 478.

The defendant may show that he intervened in a quarrel between deceased and another and may prove the character of that quarrel. *Prior v. State*, 77 Ala. 56.

A wife who killed her husband may show that he was attacking her with a hoe and that he had at other times attacked and threatened her. *Williams v. State* (Tex.), 70 S. W. 756.

The defendant's reputation for peace is relevant to show the probability that he acted in self-defence. *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883.

But evidence that the defendant asked another to go to the assistance of the deceased after the injury is no evidence to prove self-defence. *State v. Roberts*, 63 Vt. 139.

Where the defendant claimed that he killed deceased defending himself from a mob, he may prove the cries of the mob from the time it formed to show its temper and purpose. *Goins v. State*, 46 Ohio St. 457.

#### *Previous Attacks by Deceased.*

The defendant, in order to corroborate other evidence of self-defence, may show that the deceased had made a previous attack on him. *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17; *State v. Graham*, 61 Iowa, 608; *Jackson v. State*, 28 Tex. App. 108.

But such evidence is not admissible where there is no evidence upon which to base a reasonable inference that the defendant acted in self-defence. *State v. Jefferson*, 43 La. Ann. 995.

#### *Attacks by Deceased on Others.*

To show who was the aggressor where evidence is conflicting, the defendant may show that the deceased attacked others on the way to the scene of the homicide. *State v. Beird* (Iowa), 92 N. W. 694.

#### *Reasonable Apprehension of Danger.*

Where the defendant, charged with assault with intent to kill, had fired at individuals whom he believed had been members of a

band of Whitecappers that had assaulted the defendant, evidence of the Whitecapping assault is admissible to show the ground for the defendant's apprehension of danger when he fired. *Dauids v. People*, 192 Ill. 176.

The defendant, in homicide, may not prove that the deceased had had fears of an attack by other parties. *State v. Patrick*, 48 N. C. 443; *Woolfolk v. State*, 85 Ga. 69; *Com. v. Schmous*, 162 Pa. 326.

In *Boyle v. State*, 97 Ind. 322, the defendant was allowed to testify that the deceased had told him of assaults made by deceased upon others and that he preferred a knife to a gun.

The defendant may show that he had been told that deceased was a dangerous man, where the issue is self-defence, to show that he had reasonable ground for apprehension. *State v. Cross*, 68 Iowa, 180; *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75.

The defendant may not prove that he told a third party that he was afraid of the deceased, when the latter had at that time done nothing to excite fear. *State v. Carey*, 56 Kan. 84, 42 Pac. 371.

Where the claim was self-defence the defendant was not allowed to prove certain previous acts of precaution on his part to show his fear of the accused. *Nunn v. Com.*, 33 S. W. 941.

Evidence that defendant was in such nervous condition as to be likely to apprehend violence and danger is not admissible. *State v. Shoultz*, 25 Mo. 128; *State v. Sorenson*, 32 Minn. 118.

The belief of the defendant that the deceased would carry out his threat to kill is not admissible. *People v. Ryan*, 55 Hun, 214.

Defendant may prove that deceased had said in defendant's presence that he carried firearms. *People v. Adams*, 137 Cal. 580. In such case the State may show that deceased was not armed. *Ibid.*

#### *Intention of the Deceased.*

What the real intention of the deceased toward the defendant was is immaterial on the question of self-defence; it is the appearance of intention as presented to the defendant that must justify him. *People v. Fitchpatrick*, 106 Cal. 286, 39 Pac. 605. Yet surely the real intention is some evidence as to what the appearance of intention was.

*Size and Strength of Deceased.*

The defendant may show that the deceased was larger and stronger than himself. *Smith v. U. S.*, 161 U. S. 85; *Com. v. Barnacle*, 134 Mass. 215, 45 Am. Rep. 319.

The defendant was allowed to show that he was small, weak, and nearly blind, while deceased was violent and powerful. *Brumley v. State*, 21 Tex. App. 222, 17 S. W. 140.

The defendant may show that the deceased was a large man, was in the habit of carrying arms, and started the fight. *State v. Yokum* (S. D.), 84 N. W. 389.

*Apprehension of Others.*

The defendant is not allowed to show that third persons thought or said he was in danger from the deceased. *Hudgins v. State*, 2 Ga. 173; *State v. Rhoads*, 29 Ohio St. 171; *State v. Summers*, 36 S. C. 479; *contra*, *Stroud v. Com.* (Ky.), 19 S. W. 976.

But in *People v. Lilly*, 38 Mich. 270, third parties were allowed to testify that deceased's conduct was so violent as to make them afraid.

And the defendant may prove that third parties had told him that the deceased was a dangerous man. *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903.

In *Phipps v. State*, 36 Tex. Cr. R. 216, 36 S. W. 753, an officer was allowed to say that the reason he followed deceased to defendant's place of business was that he looked for trouble.

*Hatred of Defendant by Deceased.*

Letters of deceased to third parties, showing bitter hatred of defendant, the contents of which had been communicated to the defendant, may be given in evidence. *Ball v. State*, 29 Tex. App. 107, 14 S. W. 1012.

Previous difficulties and ill-feelings may be proved by the defendant in corroboration of other evidence reasonably indicating that the act may have been in self-defence. *DeForest v. State*, 21 Ind. 23; *State v. Schleagel*, 50 Kan. 325; *Russell v. State*, 11 Tex. App. 288.

*Self-Defence — Threats of Deceased.*

Threats made by the deceased against the accused are admissible whether they were communicated to the accused or not. If communicated, they would assist in proving self-defence, and that the defendant was under a reasonable apprehension of danger. If uncommunicated, they would at least tend to show that the deceased was the aggressor. "The philosophy of the matter is that where there has been an encounter, and it is not shown by direct evidence who was the assailant, threats of an intention to assail are some evidence of an assault having been made by the one who made the threats." *Wilson v. State*, 30 Fla. 242; *Stokes v. People*, 53 N. Y. 174; *State v. Evans*, 33 W. Va. 426; *Babcock v. People*, 13 Colo. 515.

The defendant may show that he fired because he thought the prosecuting witness was advancing with a gun, though it actually was an umbrella, and to show ground for such apprehension he may prove prior threats and altercations. *Enlow v. State*, 154 Ind. 664; *Johnson v. State* (Miss.), 27 So. 880 (similar).

Previous threats of the deceased admitted as a link in the evidence of self-defence. *Harkness v. State* (Ala.), 30 So. 73; *Bell v. State*, 69 Ark. 148.

Previous threats of the deceased may be proved as tending to show that the accused acted in self-defence. *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 50; *Williams v. People*, 54 Ill. 422 (threats to "clean out and whip" the defendant); *Brumley v. State*, 21 Tex. App. 222 (threats to kill); *Ball v. State*, 29 Tex. App. 107 (same).

Threats by the deceased against defendant because of slanders published by the latter may be proved. *State v. Bartlett*, 170 Mo. 658, 59 L. R. A. 756.

Defendant may prove threats of the deceased to kill him, and that he sent a third party to the deceased to effect a compromise. *Everett v. State*, 30 Tex. App. 682.

On the issue of self-defence the accused may show prior threats of the deceased known to him, the existence of a grudge, and prior assaults by the deceased on defendant. *State v. Scott*, 24 Kan. 68; *Rippy v. State*, 39 Tenn. 217.

*Uncommunicated Threats of Deceased.*

Threats of the deceased that had not been communicated to the defendant are not admissible to show that he had a reasonable apprehension of danger, but they may be admissible to show the state of mind and intentions of the deceased. *State v. Faile*, 43 S. C. 52; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883; *State v. Evans*, 33 W. Va. 417; *State v. Vaughan*, 22 Nev. 285; *State v. Fisher*, 33 La. Ann. 1344; *State v. Elliott*, 45 Iowa, 486.

Evidence of previous threats on the part of the deceased against the defendant is admissible to corroborate evidence indicating that the deceased was the assailant. *Lester v. State*, 37 Fla. 382; *Monroe v. State*, 5 Ga. 85; *Prine v. State*, 73 Miss. 838; *State v. Harrod*, 102 Mo. 590; *Stokes v. People*, 53 N. Y. 164. Such evidence is not admissible where there is no doubt that the defendant was the aggressor, or where he himself invited the fight. *State v. Alexander*, 66 Mo. 148; *Mealer v. State*, 32 Tex. Cr. R. 102; *Robert v. State*, 68 Ala. 515; *Steele v. State*, 33 Fla. 348; *State v. Wilson*, 43 La. Ann. 840.

Evidence of previous threats on the part of the deceased is not admissible when there is not evidence to show that he did any act indicating his intention to carry out the threats. *Jenkins v. State*, 80 Md. 72; *State v. Kenyon*, 18 R. I. 217; *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257; *Harris v. State*, 47 Miss. 318; *Leigh v. People*, 113 Ill. 372.

Proof of former difficulties and ill-feeling between the deceased and the defendant cannot be admitted in evidence when there is absolutely no evidence to show that the defendant may have acted in self-defence. *Rutledge v. State*, 88 Ala. 85.

*Self-Defence — Character of Deceased.*

The character of the deceased in cases of homicide is sometimes admitted.

In *Williams v. Fambro*, 30 Ga. 233, the deceased was a slave, and the defendant claimed that he was killed while acting insubordinately. Evidence to show the previous insubordinate character of the slave was admitted. *State v. Spendlove*, 44 Kan. 1, holds that where there is doubt as to whether the defendant or

the deceased was the aggressor, such character evidence is admissible.

In *Copeland v. State*, 41 Fla. 320, character for "general cussedness" was excluded. See also, *Com. v. Haskins* (Ky.), 35 S. W. 284; *Fields v. State*, 47 Ala. 603; *People v. Murray*, 10 Cal. 309.

The conduct of the deceased at the time of the homicide is to be construed with reference to his character as theretofore known, and hence such character is admissible. *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250.

Defendant may show that deceased had just lost money to him at gambling and that at such times he was usually a dangerous man. *State v. Hunter* (Iowa), 92 N. W. 872.

The dangerous character of the deceased is immaterial where the defendant denies the killing altogether. *Manning v. State*, 79 Wis. 178.

To show self-defence where the defendant is charged with assault with intent to kill, he may prove the dangerous character of the prosecuting witness. *Upthegrove v. State*, 37 Ohio St. 662.

The deceased may be shown to have been a dangerous and powerful man where the issue is self-defence. *Brownell v. People*, 38 Mich. 732; *State v. Floyd*, 51 N. C. 392.

The character of the deceased may be admissible in evidence because certain acts and motions on the part of a man known to be dangerous justify a much greater apprehension of danger and much more sudden steps to prevent such danger, than the same acts on the part of other men. *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Perry v. State*, 94 Ala. 25; *State v. Keefe*, 54 Kan. 197.

Where the defendant, charged with homicide, has given evidence to show that he killed the deceased because there was reasonable ground to fear danger, he may prove the violent and dangerous character of the deceased. *Nichols v. People*, 23 Hun, 165; *State v. Graham*, 61 Iowa, 608; *State v. Downs*, 91 Mo. 19; *Williams v. State*, 74 Ala. 18; *Marts v. State*, 26 Ohio St. 162; *Williams v. State*, 14 Tex. App. 102, 46 Am. Rep. 237; *Smith v. U. S.*, 161 U. S. 85.

At least he may prove the dangerous character of the deceased where he knew of such dangerous character and the deceased did some overt act indicating his purpose to attack. *Hudson v.*

State, 6 Tex. App. 565, 32 Am. Rep. 593; State v. Nash, 45 La. Ann. 1137; Smith v. U. S., 161 U. S. 85; State v. Nett, 50 Wis. 524.

Evidence of the turbulent character of the deceased may be admissible on the question of self-defence. *Alexander v. Com.*, 105 Pa. 1.

Defendant may prove the character of the deceased as a dangerous man. *Jenkins v. State*, 80 Md. 72.

After showing that the deceased was intoxicated when killed, the defendant may show that the deceased was dangerous when drunk. *State v. Manns (W. Va.)*, 37 S. E. 613.

Where the accused claimed self-defence, he was not allowed to show that during a previous quarrel the deceased had armed himself with an ice-pick, for the purpose of showing deceased to have been a dangerous character. *State v. Mims*, 36 Ore. 315.

Where the defendant shot the deceased while the latter was attacking with his fists, it is not competent to show that the deceased was a trained boxer on the issue of self-defence. *State v. Talmage*, 107 Mo. 543.

#### *Reputation for Carrying Weapons.*

Where deceased spat in defendant's face and started to draw a pistol before defendant fired, it may be shown that deceased was reputed to use deadly weapons in fights. *State v. Ellis*, 30 Wash. 369.

The defendant has a right to show that the man he killed was generally reputed to carry dangerous weapons, where the issue is self-defence. *Glenewinkel v. State (Tex.)*, 61 S. W. 123.

On the issue of self-defence the defendant may show that the deceased was in the habit of carrying weapons, and that he had knowledge of such habit. *Wiley v. State*, 99 Ala. 146; *State v. Graham*, 61 Iowa, 608; *Riley v. Com.*, 94 Ky. 266; *King v. State*, 65 Miss. 576, 7 Am. St. R. 681. But if the defendant had no such knowledge before the homicide he cannot prove the fact. *Garner v. State*, 31 Fla. 170.

#### *Evidence Required before Character is Admissible.*

Evidence of the dangerous character of the deceased is not admissible to indicate the possibility that the defendant acted in

self-defence unless that possibility has already been indicated by other evidence. *Eiland v. State*, 52 Ala. 322; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *Gardner v. State*, 90 Ga. 310, 35 Am. St. R. 202; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Abbott v. People*, 86 N. Y. 460; *Com. v. Straesser*, 153 Pa. 451; *Walker v. State*, 28 Tex. App. 503; *Carle v. People*, 200 Ill. 494.

Where there is no evidence that the deceased manifested any intention to attack the defendant, evidence of the deceased's dangerous character is not admissible. *Cannon v. People*, 141 Ill. 270; *Lang v. State*, 84 Ala. 1, 5 Am. St. R. 324; *Doyal v. State*, 70 Ga. 134; *State v. Vallery*, 47 La. Ann. 182, 49 Am. St. R. 363; *Irvin v. State*, 43 Tex. 236; *State v. Harris*, 59 Mo. 550.

The dangerous character of the deceased cannot be shown in defence where the deceased did nothing whatever to excite apprehension on defendant's part. *State v. Haab*, 105 Pa. 230; *State v. Morrison* (W. Va.), 38 S. E. 481; *State v. Madison* (W. Va.), 38 S. E. 492; *State v. Napoleon*, 104 Pa. 164.

If the trial judge believes the evidence in support of the claim of self-defence to be totally unworthy of belief, evidence of the dangerous character of the deceased should not be admitted. *State v. Janvier*, 37 La. Ann. 644.

But if the evidence affords even slight ground for the inference of self-defence it is error to exclude the evidence of deceased's character. *Garner v. State*, 28 Fla. 113, 29 Am. St. R. 232.

The defendant may not show the quarrelsome character of the deceased where the latter was killed with a rock while running away from the defendant. *Jackson v. Com.* (Va.), 36 S. E. 487.

In *State v. Rollins*, 113 N. C. 722, it was held that the dangerous character of the deceased may not be proved, even on the issue of self-defence, unless it be shown that the defendant knew of such dangerous character.

"It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols, belted behind them and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly

encounters for causes and provocations that would be regarded as utterly trivial by peaceable men ; and that if one of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons would suggest no such thought, and in such case the pistol would have to be drawn and exhibited before any such thing would be conceived, unless there had been some very extraordinary provocation.

"This state of things here is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject ; and men act upon it, and are compelled to act upon it, in defending themselves from deadly assaults. . . . It may be deduced from these authorities that the general character of the deceased for violence may be proved when it would serve to explain the actions of the deceased at the time of the killing ; that the actions which it would serve to explain must first be proved before it would be admissible as evidence ; that if no such acts were proved as it would serve to explain, its rejection when offered in evidence would not be error ; and that, if rejected when a proper predicate has been established for its admission, it is held to be error." *Horbach v. State*, 43 Tex. 250.

#### *Character of Third Parties.*

Where the defendant claims to have been attacked by deceased and a third party, he may prove the dangerous character of such third party. *Tiffany v. Com.*, 121 Pa. 165, 6 Am. St. R. 775.

Where during a fight between the defendant and a negro, a third party was killed, the defendant may show the tough character of the negro, and the State may rebut the testimony. *Warren v. Com.*, 99 Mass. 370.

#### *Defence of Another.*

Defendant may prove that the deceased and third parties who were assaulting defendant's brother had previously made threats. *People v. Curtis*, 52 Mich. 616.

Where defendant claimed that the deceased was about to assault defendant's sister, previous threats of the deceased against the sister may be proved, even though they were not known by the defendant. *State v. Felker*, 27 Mont. 451. It may be shown too that defendant knew of other assaults made by the deceased upon the woman several months before. *Ibid*.

Defendant cannot testify that his belief was that the deceased was about to attack defendant's son; the material thing is the actual ground for such belief. *State v. Downs*, 91 Mo. 19.

Where defendant claims that he was protecting his wife, the State may show that she kept a house of prostitution to show that deceased may have been there for a purpose not felonious. *People v. Pierson*, 2 Idaho, 71, 3 Pac. 688.

#### *Rebuttal of Self-Defence.*

It is competent for the State to show threats of the defendant to rebut his claim of self-defence. *Bolzer v. People*, 129 Ill. 112.

The State may show all the circumstances of the altercation, threats made, relative size and strength of the parties. *Palmore v. State*, 29 Ark. 248.

The State may show in rebuttal that there was no great difference in size between the defendant and the deceased. *Wilkins v. State*, 98 Ala. 1, 13 South. 312.

Also that the accused is larger and stronger than the deceased. *Hinch v. State*, 25 Ga. 699.

Where defendant had shown that all the appearances pointed to danger to himself from the deceased, the State was not allowed to show in rebuttal that the deceased was on a peaceful errand past defendant's house. *Brumley v. State*, 21 Tex. App. 222, 17 S. W. 140.

To rebut the claim of self-defence the State cannot prove statements of the deceased that the trouble was over and that he did not want a gun, when such statements were not known by the defendant. They did not lessen the appearance of danger to him. *May v. Com.*, 3 Ky. Law Rep. 474.

The State may prove the peaceable character of the deceased to rebut defendant's claim of self-defence. *Fields v. State*, 134 Ind. 46.

*Intoxication as a Defence.*

Intoxication admitted to prove incapacity to commit homicide. *State v. Horne*, 9 Kan. 128.

Excessive use of morphine and whiskey admitted to show general criminal irresponsibility. *Franklin v. Franklin*, 90 Tenn. 49.

As negating the existence of an intent, the defendant may show that he was drunk (*Leroy v. State* (Ala.), 25 So. 247), or he may show that he was ignorant of facts which made his act criminal. *Farrell v. State*, 32 Ohio St. 456.

The defendant may prove his incapacity to commit the crime charged; *e. g.* illness, paralysis, intoxication. "In such case the intoxication is not shown for the purpose of excuse or mitigation of the offence charged, but as evidence tending to show that he was not present and did not commit the acts constituting the offence. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed; but certainly in the absence of any such direct evidence, the accused may give in evidence any fact which would have a natural tendency to render it improbable that he was there and did the acts complained of; and the fact that drunkenness was the thing which tended to prove such improbability can make no difference." *Ingalls v. State*, 48 Wis. 647.

*Experiments to Show Impossibility.*

Where it was shown that after the time of an offence the defendant caught up with and passed three wagons, he should be permitted to give evidence of experiments indicating that if defendant had committed the offence he could not have passed the wagons. *Clark v. State* (Tex.), 40 S. W. 992.

*Evidence that a Third Person Did the Act.*

It seems that the defendant may not show that another has previously been convicted of the same crime. *State v. Smarr*, 121 N. C. 669; *Kazer v. State*, 5 Ohio, 280 (conviction of another for the same arson).

The confession of a third person that he committed the crime

in question cannot be proved by the accused, for the reason that the law excludes it as hearsay.

The defendant may give evidence indicating that the crime charged was committed by another, and may then show that such other person had a motive to commit the crime and what it was. *Green v. State*, 154 Ind. 655.

In *Com. v. Felch*, 132 Mass. 22, the defendant, charged with an attempt at abortion causing death, was not allowed to prove that the deceased had told a witness that she was pregnant by one not the defendant, and that if that one did not procure an abortion she would do so herself. But see *Com. v. Trefethen*, 157 Mass. 180.

The defendant may show that the crime was committed by another, even though that other has already been acquitted (*People v. Mitchell*, 100 Cal. 328), and the evidence offered is admissible even though it would not be sufficient to prove such other person's guilt beyond a reasonable doubt (*Sidney v. Com.*, 1 Ky. Law Rep. 120); but the mere fact that another has been indicted for the crime is not admissible. *Taylor v. Com.*, 90 Va. 109.

Any evidence tending to show that another than the defendant committed the crime is competent. *Synon v. People*, 188 Ill. 609.

### *Bastardy Cases.*

In bastardy cases the defendant may show intercourse by the woman with other men at about the time conception must have taken place. *State v. Seevers*, 108 Iowa, 738; *Eddy v. Gray*, 4 Allen, 435; *State v. Warren*, 124 N. C. 807; *Humphrey v. State*, 78 Wis. 571; *Benham v. Richardson*, 91 Ind. 82.

### *Motives of Third Persons.*

That a third person had a motive to do the act of which the defendant is accused is sometimes admitted and sometimes not. It would, of course, have some weight in the defendant's favor.

Cases admitting such evidence: *Crawford v. State*, 12 Ga. 142; *State v. Johnson*, 30 La. Ann. 921; *contra*, *Com. v. Abbott*, 130 Mass. 475; *Tatum v. State*, 131 Ala. 32; *Horn v. State* (Wyo.), 73 Pac. 705.

The defendant cannot prove that others had a motive to do the

act charged, unless he in other ways connects them with the act. *Tatum v. State* (Ala.), 31 So. 369.

The defendant may prove that another had a motive to commit the crime. *Sawyers v. State*, 83 Tenn. 694.

Where there is no direct evidence that the defendant struck the fatal blow, he may show that the deceased had had a quarrel with another about the time of the homicide. *Crawford v. State*, 12 Ga. 142; *State v. Johnson*, 30 La. Ann. 921.

It is immaterial that others had motives to commit the crime, where it is shown that they had no opportunity. *Means v. State*, 10 Tex. App. 16, 38 Am. Rep. 640.

The defendant cannot show that others had a motive to commit the crime in question unless he further shows that they had the opportunity. *Ogden v. State* (Tex.), 58 S. W. 1018.

### *Threats of Third Persons.*

Courts generally do not allow the accused to introduce evidence that third persons had threatened to do the act in question; although it cannot be doubted that proof that a third person did the act in question excludes the conclusion that the accused did it; and if threats by the accused tend to show that he did the act, then why should not threats of third persons tend to show that they did it? The reasons given for excluding such testimony are various. See *State v. Beaudet*, 53 Conn. 543; *Schoolcraft v. People*, 117 Ill. 271; *State v. Fletcher*, 24 Ore. 295; *State v. Crawford*, 99 Mo. 74; *Carlton v. People*, 150 Ill. 181. But see *Alexander v. U. S.*, 138 U. S. 353, and *Worth v. R. R. Co.*, 51 Fed. Rep. 171, where such evidence was admitted.

The defendant cannot show that others had threatened to kill the deceased in the absence of any other evidence tending to connect such others with the homicide in question (*Woolfolk v. State*, 81 Ga. 551; *State v. Mann*, 83 Mo. 589; *State v. Duncan*, 28 N. C. 236; *Henry v. State* (Tex.), 30 S. W. 802); but in connection with such other evidence, threats by the third persons may be proved (*Morgan v. Com.*, 77 Ky. 106); also where the evidence against the defendant is entirely circumstantial. *Murphy v. State*, 36 Tex. Cr. Rep. 24; *Leonard v. Terr.*, 2 Wash. T. 381.

In *State v. Davis*, 77 N. C. 483, the defendant was not allowed

to show that a third person went toward the home of the deceased, armed and threatening to kill the deceased. See also *State v. Lambert*, 93 N. C. 618.

In *Alexander v. U. S.*, 138 U. S. 353, the defendant, charged with homicide, was allowed to show that at the time the deceased disappeared a party of armed men were looking for him with threats to kill him for eloping with a married woman.

### *Suicide.*

The defendant may give in evidence other possible hypotheses upon which the act charged may be explained. He may show that the deceased may himself have inflicted the wound causing death. *State v. Lee*, 65 Conn. 265.

The absence of motive on the part of the defendant may be considered by the jury as supporting the claim that the deceased shot himself after wounding the defendant. *Smith v. State* (Neb.), 85 N. W. 49.

### *Deceased's Intention to Commit Suicide.*

The defendant may show that the deceased had planned to commit suicide, for that would make it more or less probable that the deceased was not killed by the defendant. "It may be true that an unmarried woman pregnant with child, if she has an intention to commit suicide, does not always carry that intention into effect, although she have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide." *Com. v. Trefethen*, 157 Mass. 180; *State v. Asbell*, 57 Kan. 398.

The defendant in homicide may prove a declaration of the deceased that it was his intention to commit suicide, where the circumstances are not inconsistent with that manner of death. *Com. v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235; *People v. Gehmele*, 1 Sheld. (N. Y.) 251; *Blackburn v. State*, 23 Ohio St. 146; *Boyd v. State*, 82 Tenn. 161.

Cases where such evidence was not admitted. *State v. Punshon*, 124 Mo. 448, 133 Mo. 44; *State v. Fitzgerald*, 130 Mo. 407.

And melancholy statements by the deceased that he was sick of life are not admissible where there is no claim that he committed suicide. *State v. Fournier*, 68 Vt. 262.

*Motives for Suicide.*

The defendant may show that the deceased had a motive for suicide, as that deceased was an unmarried woman and pregnant. *Spencer Cowper's Trial*, 13 How. St. Tr. 1166; *Blackburn v. State*, 23 Ohio St. 165.

*Complaint.*

"In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that soon after the offence he made a complaint to persons to whom he would naturally complain, are deemed to be relevant. The terms of the complaint are irrelevant; except that in a case of rape or other sexual offence where the consent of the person against whom the offence was committed to the act charged as an offence is in issue, the terms of the complaint are relevant as showing that the conduct of such person was consistent with the denial of consent." Stephen's Dig. Evid., Art. 8.

The American authorities generally state the rule that the fact of complaint is relevant as applying only to prosecutions for rape and other offences against women. *American Law Review*, vol. xiv, pp. 829-838; *Haynes v. Com.*, 28 Gratt. (Va.) 942.

In rape cases the fact of complaint may be shown. *State v. Carroll*, 67 Vt. 477; *Com. v. Phillips*, 162 Mass. 504; *Stevens v. People*, 158 Ill. 111; *People v. Stewart*, 97 Cal. 238; *Cross v. State*, 132 Ind. 65; *Parker v. State*, 67 Md. 329; *Lee v. State*, 74 Wis. 45; *Johnson v. State*, 17 Ohio, 593; *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366.

A delay of weeks or months, if explained, does not render the fact of complaint inadmissible (*State v. Wilkins*, 66 Vt. 1); nor does that of more than a year; it simply affects the weight of the evidence. *State v. Byrne*, 47 Conn. 465, 466, 467.

The conduct of a woman subsequent to the commission of an alleged abortion may be shown in a prosecution against one for performing the abortion. *State v. Lee*, 69 Conn. 196.

Evidence of constancy in accusation is admissible. *State v. De Wolf*, 8 Conn. 99.

*Terms of Complaint Irrelevant.*

The terms of the complaint are irrelevant. *State v. Knapp*, 45 N. H. 148, 155.

But in prosecutions for offences against women the terms of the complaint are considered relevant. *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436; *Burt v. State*, 23 Ohio St. 394; *Hill v. State*, 5 Lea (Tenn.), 725. See also *Benton v. Starr*, 58 Conn. 285. So where the complainant is a girl of tender years. *Harmon v. State*, 70 Wis. 448.

"The count upon which *Lillyman (R. v. Lillyman (1896), 2 Q. B. 167)* was substantially tried, and upon which alone (*ibid.* at p. 170) he was convicted, charged that he unlawfully attempted to have carnal knowledge of a girl under sixteen and over thirteen. The question of her consent was therefore immaterial (Criminal Law Amendment Act, 1885, § 5, by which the offence was created). In giving her evidence, however, the girl asserted that she did not consent to the attempt. Sir Henry Hawkins admitted evidence of the terms of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged. The prisoner was convicted, and the case reserved on the question whether this evidence was admissible. The Court (Lord Russell, C. J., Pollock, B., Hawkins, Cave, and Wills, JJ.) affirmed the conviction. The ground of the decision is clearly stated in two passages of the judgment of the Court, delivered by Sir Henry Hawkins. 'It (the complaint) is clearly not admissible as evidence of the facts complained of. . . . The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains' (*ibid.* at p. 170). 'The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming

that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her' (*ibid.* at p. 177). In other words, the judgment decides that where a woman has made a statement as to her own consent, which in the case before the Court happened to be perfectly irrelevant, the details of her complaint may be admitted only because they may serve as a test of the credibility which ought to attach to the relevant parts of her testimony." Stephen's Dig. Evid., Appendix, Note V.

*Character of the Prosecutrix in Rape and Similar Offences.*

"When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject. The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted. She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted." Stephen's Dig. Evid., Art. 134.

The character of the prosecutrix for chastity in rape cases is relevant on the issue of consent to the act and is admissible in evidence. This applies also to prosecutions for other similar offences. *People v. Johnson*, 106 Cal. 289; *Seals v. State*, 114 Ga. 518; *Shirwin v. People*, 69 Ill. 56; *Anderson v. State*, 104 Ind. 471; *Com. v. Harris*, 131 Mass. 336; *O'Blemis v. State*, 47 N. J. L. 279; *Gore v. Curtis*, 81 Me. 403 (solicitation to commit adultery); *Gross v. Brodrecht*, 24 Ont. App. 687 (indecent assault); *Com. v. McDonald*, 110 Mass. 405; *Bedgood v. State*, 115 Ind. 275.

It may be shown that the prosecutrix was a prostitute. *Rice v. State*, 35 Fla. 236; *People v. McLean*, 71 Mich. 310; *Woods v. People*, 55 N. Y. 515.

In actions for seduction, and the like, the woman's bad character as to chastity may be shown. *Van Storch v. Griffin*, 71 Pa. 240.

In action for seduction the good reputation of the girl in one place may be proved to rebut evidence of her bad reputation in another place. *Milliken v. Long*, 188 Pa. 411.

*Particular Acts of Unchastity.*

On this subject there is a conflict. The following cases hold that particular acts of unchastity with others cannot be proved. *Gore v. Curtes*, 81 Me. 403; *Com. v. Harris*, 131 Mass. 336; *Com. v. Regan*, 105 Mass. 593; *People v. McLean*, 71 Mich. 307; *Shartzer v. State*, 63 Md. 149; *Rice v. State*, 35 Fla. 236; *Richie v. State*, 58 Ind. 355; *contra*, *State v. Hollenbeck*, 67 Vt. 34; *Hoffman v. Kemerer*, 44 Pa. St. 453; *Doyle v. Jessup*, 29 Ill. 460; *Smith v. Yaryan*, 69 Ind. 445; *People v. Benson*, 6 Cal. 221; *State v. Forstner*, 43 N. H. 89; *State v. Knapp*, 45 N. H. 148; *People v. Abbot*, 19 Wend. 194; *R. v. Martin*, 6 C. & P. 562.

When woman is under age of legal consent, such evidence in rape cases has been held incompetent. *People v. Johnson*, 106 Cal. 289; *People v. Abbott*, 97 Mich. 484; *State v. Duffey*, 128 Mo. 549.

*Explanations of Suspicious Circumstances.*

Where it was shown that several sizes of shot were found in the body of the deceased and also in the defendant's gun, the defendant was allowed to prove that the use of such shot in that manner was common in the neighborhood. *Cooper v. State*, 23 Tex. 343.

The defendant is allowed to give in evidence other hypotheses to explain incriminating circumstances. He may show a reason for carrying a gun (*People v. Malaspina*, 57 Cal. 628); or the reason for the possession of strychnine (*People v. Cuff*, 122 Cal. 589); or a reason for going to the locality of the crime. *State v. English*, 67 Mo. 136.

In rebuttal of evidence of facts claimed to show motive or state of mind, the accused may show what led up to those facts. *Rufer v. State*, 25 Ohio St. 464; *State v. Spring, Tappan*, 167.

The defendant in *Granger v. State* (Tex.), 31 S. W. 671, was allowed to explain the fact that his gun had been recently fired, by saying that he had shot a hawk, which he produced. He was convicted, nevertheless.

Where the defendant, charged with forgery of a check, testifies that he won it in a poker game, he may be asked, on cross-examination, whether he told that story to the officers when he

was first accused of the crime, and it may be shown that he did not. *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50.

The defendant may show that the reason he was encased in steel armor and had four pistols was that two organizations of which deceased was a member had threatened defendant's life. *People v. Lee Chuck*, 74 Cal. 30.

Where the State has given evidence that the defendant bought a gun to kill the deceased, he may show that he had been threatened and hence bought it to defend himself. *State v. Doherty*, 72 Vt. 381.

The defendant may show that in buying a gun he was preparing, not to make an attack, but to resist one. *State v. Claire*, 41 La. Ann. 191; *Long v. State*, 52 Miss. 23.

In a murder case, it is error not to allow the defendant to explain how he happened to have a pistol with him. *Aaron v. State*, 31 Ga. 167.

The defendant charged with a homicide and shown to have had blood stains on his face and shirt, may prove that the day before the homicide occurred he asked a witness for his handkerchief because he had the nosebleed. *Murphy v. State*, 36 Tex. Cr. Rep. 24, 35 S. W. 174.

Where one accused of arson had previously removed his own goods from the house, it is error to exclude his explanation for such removal. *People v. Fournier* (Cal.), 47 Pac. 1014.

### *Evading Arrest Explained.*

The defendant may explain his evasion of arrest consistently with his innocence. In *France v. State*, 68 Ark. 529, 533, it is said: "Now, the evidence in this case shows, we think, that this defendant and those charged with him did not intend permanently to avoid arrest. They stated that they endeavored to avoid arrest at the time, for the reason that they could not give a bond, and did not wish to lie in jail until they could have a trial, but intended to surrender soon. The fact that they continued to remain in the neighborhood of their homes until arrested, although they could easily have left the State, seems to support this statement. Although this endeavor to avoid arrest was a circumstance against defendant calculated to arouse a suspicion that he was guilty, yet, taken in connection with the explanation given for it, we

think it hardly sufficient to justify the conviction, when standing alone without other circumstance to connect defendant with the crime."

*Flight Explained.*

In *Tilley v. Com.*, 90 Va. 99, the defendant showed that he fled the day after the murder because there was great excitement at the inquest and he was in great danger of being lynched, that after his arrest he was furnished with instruments with which to escape, and that he turned them over to his attorney.

The accused may offer explanations of his flight or concealment to rebut any inference therefrom that he is guilty. In *Kennedy v. Com.*, 14 Bush, 346, the accused gave the weak explanation that he fled because the jail was filthy; in *Batten v. State*, 80 Ind. 394, it was fear of violence.

The defendant may rebut the inference of guilt from his flight by proving that he fled from fear of summary vengeance by the father of the deceased. But a witness cannot testify that "the defendant seemed afraid" of the said father. *Lewis v. State*, 96 Ala. 6, 10.

And he may explain his disappearance from the inquest to which he was summoned. In *Bailey v. State*, 104 Ga. 530, the Court says: "Doubtless he saw that he was suspected at the inquest, and seeing the relatives of the deceased armed, in a moment of such excitement it is not strange, and is entirely consistent with the theory of his innocence, that he should have endeavored to escape from such an atmosphere of danger."

*Explanations of Possession of Another's Property.*

Defendant may explain the possession of money belonging to another by evidence that he found it. *White v. State*, 28 Tex. App. 71.

The defendant, in possession of animals belonging to another, may explain by evidence that he took the property under the belief that it was his. Evidence that a brand on the animal looked like the brand of the defendant would be a corroborative circumstance. So it may be shown that herds became mixed by accident, or that bales belonging to defendant had been placed near similar bales belonging to others, or that two animals looked alike. *Randle v. State*, 49 Ala. 14 (bales of cotton); *Thurman v.*

State, 33 Tex. 684 (hog) ; *Misselkline v. State*, 21 Tex. App. 335 (strong resemblance between pigs) ; *Mims v. State* (Tex.), 32 S. W. 540 (cow mixed with a herd) ; *Brooks v. State* (Tex.), 27 S. W. 141 (brand W. B. looked like W. K.).

Where the defendant was charged with larceny of a steer, and fresh meat was found in his possession, he may show that this meat came from another steer of his own. But even so, the jury need not be instructed to acquit, if they find such evidence of the defendant to be true. *State v. Minor* (Iowa), 77 N. W. 330.

Defendant, charged with the larceny of animals that he had driven off and sold, may show that at once upon discovering the fact he had sought the owner and offered or paid him the value of the animals (*Hall v. State*, 34 Ga. 208) ; or that he returned the property itself. *Bennett v. State*, 28 Tex. App. 342 ; *Hicks v. State* (Tex.), 47 S. W. 1016.

One charged with larceny may prove that he himself put the officers on the track of the stolen goods. *Pinkard v. State*, 30 Ga. 757.

Defendant, accused of taking a package of tobacco, and having been seen in possession of such a package, may explain where he got it. *State v. Brundidge*, 118 Iowa, 92.

A defendant charged with the larceny of property may show that he purchased it. The truth of his evidence is for the jury. *Smith v. State*, 24 Tex. App. 290. The reasonableness of the defendant's explanation is for the jury. *State v. Mandich* (Nev.), 54 Pac. 516.

In explaining the possession of recently stolen goods, the defendant may prove what the person from whom he got them said at the time. *State v. Jordan*, 69 Iowa, 506 ; *Guajardo v. State*, 24 Tex. Crim. 603.

The presumption of guilt arising from the possession of recently stolen goods is wholly rebutted by showing that such possession was obtained since the date of the stealing. *State v. Humason*, 5 Wash. 499 ; *Heed v. State*, 25 Wis. 421.

If the prosecution relies on the fact of possession to prove larceny, the accused may offer in evidence any explanation given by him at the time when he was first found with the property in his possession. *Goens v. State* (Tex.), 31 S. W. 656. And the jury should give such explanation as much weight as they deem it entitled to in view of its inherent probability, and the failure of the State to disapprove it where the means of doing so lie within its power. *Payne v. State*, 57 Miss. 348.

*Explaining away Threats.*

When it has been shown that the defendant had had an intention to commit a crime or had threatened to do so, he may show the length of time since elapsed justifying an inference that the intention had been abandoned and the circumstances under which the threats were made. *Atkins v. State*, 16 Ark. 581.

To explain threats that he had made against the deceased, the accused may prove that prior thereto the deceased had attacked him with a hatchet. *Boljer v. People*, 129 Ill. 112.

The defendant may show that threats made by him were bragadocio only, as by showing his threat to whip several men at once. *People v. Curtis*, 52 Mich. 616.

*Identity.*

To rebut evidence of identity the accused may show that another or others very closely resemble him. *White v. Com.*, 80 Ky. 483. This sort of evidence was rejected when offered by the State in *Com. v. Webster*, 5 Cush. 295.

In *Grant v. State* (Tex.), 58 S. W. 1025, the defendant escaped punishment, where his conviction rested upon tracking him, by showing that others thereabouts had a wagon, a horse, and a mule, and wore shoes similar to his.

*Absence of Motive.*

"The absence of evidence suggesting motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction." *Pointer v. U. S.*, 151 U. S. 396. And see note to Chapter III.

Absence of motive to do the act charged may be proved by the defendant, but it does not entitle him to an acquittal; it is merely a fact to be weighed by the jury. *Salm v. State*, 89 Ala. 56.

In *Pogue v. State*, 12 Tex. App. 283, the defendant, charged with homicide, showed that he and the deceased were friends and he had no motive to kill; that his peculiar conduct afterwards might fully be accounted for by the fact that he was drunk; that the defendant's clothes bore no blood stains, although the

killing was with a knife and there were several wounds; that the defendant did not leave the neighborhood, but appeared surprised when told of the deceased's death, and attended the inquest. Although there were many circumstances indicating the defendant's guilt, it was held that they were not wholly inconsistent with his innocence.

*Innocent Motive.*

Where the defendant, a saloon keeper, was charged with injuring a canal for the purpose of selling beer to the repairing gang, and he is shown to have bought fifteen barrels of beer before the offence was committed, he may show that he bought an unusual amount of beer at that time to avoid payment of a revenue tax about to be imposed. *People v. Manahan*, 70 N. Y. Supp. 108.

*Rebuttal of Motive.*

Where robbery is the alleged motive for a homicide, the defendant may show that the deceased was not reputed to have money and actually had none. *Lancaster v. State* (Tex.), 31 S. W. 515.

Where the motive for a murder may have been robbery, certain money in deceased's possession being gone, the defendant proved that he had no need of money, and had \$300 at the time, the amount possessed by the deceased being \$30. *Tilley v. Com.*, 90 Va. 99.

A defendant charged with robbery may not prove that he was already possessed of property to negative the existence of a motive. *Reynolds v. State* (Ind.), 46 N. E. 31.

Defendant charged with wife murder may rebut evidence that his relations with his wife were unfriendly by proof of affectionate letters from her. *Pettit v. State*, 135 Ind. 393; *State v. Leabo*, 84 Mo. 168, 54 Am. Rep. 91.

The defendant cannot prove the fact that the deceased and he were on friendly terms a year before the homicide. *Com. v. Twitchell* (Pa.), 1 Brewst. 551.

The defendant may not prove specific acts of kindness to the person claimed to have been killed by him, where the State has introduced no evidence of unkindness. *Murphy v. People*, 9 Colo. 435.

*Voluntary Surrender.*

In America the courts have very generally excluded evidence on the part of the accused that he surrendered himself openly and voluntarily. *State v. Musick*, 101 Mo. 260; *State v. McLaughlin*, 149 Mo. 19; *Vaughn v. State*, 130 Ala. 18; *Oliver v. State*, 17 Ala. 587; *contra*, *Boston v. State*, 94 Ga. 590; *White v. State*, 111 Ala. 92.

In *Vaughn v. State*, 130 Ala. 18, the defendant was not allowed to prove that he refused to flee and surrendered voluntarily, since there was no evidence on the part of the State that he attempted to get away.

"The district attorney objected to the question, and appellant's counsel stated to the Court that he desired to show that appellant, immediately after the shooting, went to Paso Robles for the purpose of surrendering himself to the officers, but acting upon the advice of a Mr. Korn he returned home and waited for the officers to come after him. The Court sustained the objection. This question might well have been allowed; and in many cases the refusal to allow such questions would be material error. But in the case at bar there was no evidence or pretence that appellant attempted flight, therefore he could not have been prejudiced by the rejection of the testimony." *People v. Shaw*, 111 Cal. 171, 176.

That the accused voluntarily appeared to answer the charge may be shown. *State v. Gardner*, Tappan (Ohio), 124.

*Refusal to Escape.*

It has many times been held in the United States that the defendant cannot prove that he refused to escape when he had an opportunity to do so. *People v. Rathburn*, 21 Wend. 509; *Com. v. Hersey*, 2 Allen, 173; *People v. Montgomery*, 53 Cal. 576; *Jordan v. State*, 81 Ala. 20; *Kennedy v. State*, 101 Ga. 559.

Such evidence was admitted in *Lewis v. State*, 4 Kan. 309.

*Conduct Indicating Consciousness of Innocence.*

Courts very generally refuse to allow proof of defendant's conduct to show his consciousness of innocence, though it would seem to be equally relevant with conduct to show consciousness

of guilt. *Campbell v. State*, 23 Ala. 44; *State v. Strong*, 153 Mo. 548.

To show innocence one cannot show that on other occasions he had opportunities to violate the law but did not do so. *Archer v. State*, 45 Md. 33.

In *Pinkard v. State*, 30 Ga. 759, the defendant was allowed to show he put the officers on the track of the real criminal.

#### *Previous Bad Character.*

The previous bad character of the accused is certainly evidence relevant to show the probability of his having committed a crime. It could well be termed an "inculpatory moral indication, but it is not admitted," for reasons of policy and humanity.

The State may attack the character of an accused only when he introduces evidence that it is good, and even then the State may not prove any specific facts, but is restricted to evidence as to general reputation. *Bullock v. State*, 65 N. J. L. 557.

But evidence of the defendant's bad character may be given when the defendant has offered evidence of his good character. This is admitted probably not so much for the purpose of proving the defendant's guilt, as to impose a necessary check upon his introducing false evidence of good character. *Reg. v. Rowton, Leigh & C.*, 520; *Com. v. Hardy*, 2 Mass. 317; *U. S. v. Holmes*, 15 Fed. 382.

The previous bad character of the accused, though equally relevant with his previous good character, is not admissible against him. The reason is given in *Regina v. Rowton, Leigh & C.* 520, as follows: . . . "if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed with prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine."

See also *State v. Lapage*, 57 N. H. 289; *People v. Shay*, 147 N. Y. 78; *State v. Kabrich*, 39 Iowa, 277; *Com. v. Webster*, 5 Cush. 295; *State v. Beaty*, 62 Kan. 266.

*Weight of Character as Evidence.*

The Court should not charge that evidence of good character is entitled to less weight in serious than in minor crimes. *Harrington v. State*, 19 Ohio St. 264.

Proof of good character may be sufficient to rebut wholly any presumption of guilt where the defendant has been found in possession of stolen goods, particularly where his possession can be accounted for in a way consistent with innocence, as where a purse stolen in a crowd is found in a reputable man's coat-pocket. *Ingalls v. State*, 48 Wis. 647; *State v. Castra*, 93 Mo. 242; *Hughes v. State*, 8 Humph. (Tenn.) 75.

"Against facts strongly proved good character cannot avail. It is therefore in smaller offences in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect.

"But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character." *Com. v. Webster*, 5 Cush. 295, 325.

*Alibi as Evidence.*

Of the nature of an *alibi* Chief Justice Shaw in *Com. v. Webster*, 5 Cush. 295, 318, says: "When a fact has occurred, with a series

of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence, upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defence usually called an *alibi*; that is, that the accused was *elsewhere* at the time the offence is alleged to have been committed. If this is true, — it being impossible that the accused should be in two places at the same time, — it is a fact inconsistent with that sought to be proved, and excludes its possibility."

Somewhat similar to the defence of *alibi* is the defence in homicide cases that the supposed deceased is still alive or that he was alive since the time this defendant is accused of killing him. See *Com. v. Webster*, 5 Cush. 295, where the defendant tried to show that the deceased, Dr. Parkman, was seen about Boston at a time later than the time of the alleged murder.

#### *Alibi — Weight of Evidence.*

A verdict will not be set aside merely because the witnesses testifying to an *alibi* are unimpeached where the defendant was clearly identified as guilty of the crime charged. *State v. White* (Iowa), 68 N. W. 564; *State v. Stanley*, 109 Iowa, 142.

An *alibi* is of no value as a defence unless it covers all the time within which the crime may have been committed. *Brice-land v. Com.*, 74 Pa. 463.

But it is sufficient if the defendant is shown to have been at a distant place during even a small portion of the time in question, where it would have been impossible for him to have reached the scene of the crime in the remainder of the time during which he was not accounted for. *Waters v. People*, 172 Ill 367; *Henry v. State* (Neb.), 70 N. W. 924; *Miller v. Terr.*, 3 Wash. T. 554, 19 Pac. 50.

An *alibi* is not established by proof that the defendant one hour after a certain offence was in another town fifteen miles away

and connected by rail with the place of the crime. *Donaho v. State* (Tex.), 47 S. W. 469.

Where the testimony against the defendant consisted wholly of the evidence of three accomplices already convicted, who were discredited by previous inconsistent statements and by proof that they were implicating the defendant in hope of a pardon for themselves, it was held that a conviction should not be sustained in the face of the testimony of three relatives and three others that the defendant was in their company during three hours of the time the witnesses claimed he was with them, and the testimony of a half brother, that the defendant slept with him during the same night. *Waters v. People*, 172 Ill. 367.

In *Miller v. Terr.*, 3 Wash. T. 554, 19 Pac. 50, two persons were killed and robbed and their bodies sunk in a lake. The defendant had a slight motive to do away with one of them, he had a gun with which the wounds might have been given, and a boat like his had been seen going from the place of the crime toward his home. He behaved afterwards in a manner indicating consciousness of guilt. But it was shown that the gunshots had been heard about 7 A.M., that the defendant had not left home until 8 A.M., that he had arrived in Seattle at 10 A.M., and that had he been on the scene of the crime he could not have reached Seattle before 1 P.M. None of the stolen property was traced to the defendant. A conviction was set aside.

The defendant charged with arson in the nighttime may show that he was in his home and could not have left it without arousing the other inmates. *State v. Delaney*, 92 Iowa, 467.

Where the defendant alleges he was in a certain house at the time of the crime charged, he may show in outline the conversations at that time between him and the other individuals there. *State v. Bedard*, 65 Vt. 278.

*Alibi — Sufficient if Creating a Reasonable Doubt.*

It is generally held sufficient for the evidence of an alibi to raise a reasonable doubt as to the defendant's guilt; he need not establish it by a preponderance of the evidence. *Blankenship v. State*, 55 Ark. 244; *Beck v. State* (Neb.), 70 N. W. 498; *Pickens v. State* (Ala.), 22 So. 551.

If the evidence of an alibi taken in connection with the other

testimony creates a reasonable doubt of guilt, the defendant should be acquitted. *Sheehan v. People*, 131 Ill. 22; *Harrison v. State*, 83 Ga. 129; *Pate v. State*, 94 Ala. 14; *State v. Jaynes*, 78 N. C. 504.

Where the defendant relies upon an alibi alone, it must be established by a preponderance of the evidence, as against the evidence that he was near the scene of the crime; but evidence of an alibi not amounting to a preponderance may be taken in connection with other testimony to establish a reasonable doubt as to defendant's guilt. *Lucas v. State*, 110 Ga. 756.

#### *Alibi — Rebuttal.*

The accused testified that he was in a certain city at the time of the crime and saw there a procession. His description of that procession may be shown to be inaccurate. *People v. Gibson*, 58 Mich. 368.

Where a defendant claimed to have attended a certain circus at the time of the crime, and returned on a certain train, a neighbor was allowed to testify that he did not see the defendant either at the circus or on the train. *State v. Phair*, 48 Vt. 366.

In *People v. Durrant*, 116 Cal. 179, where the defendant was charged with the murder of a young lady in a church at 3 P.M., he alleged at once, and firmly adhered to his statement, that he attended at that hour a lecture at the Medical College where he was a student, and in corroboration of his statement he produced what purported to be his original notes of the lecture taken at the time. But the State showed that he had procured these very notes from a fellow student and friend after his arrest.

The State may rebut evidence in an alibi, even though it did not in chief introduce any testimony directly contradictory to such subsequently proved alibi. *State v. Maher*, 74 Iowa, 77.

Where the defendant was many miles away from the scene of the crime when arrested, and could not have reached the spot since the crime by the roundabout roads, it may be shown that the intervening fences were of wire and the defendant had a wire cutter. *Goldsby v. U. S.*, 160 U. S. 70.

*Truth.*

The accused, in order to meet evidence that he gave a false account of himself, cannot show that on other occasions he gave a true account. *Com. v. Goodwin*, 14 Gray (Mass.), 55.

*Fabrication by Others.*

Where the only evidence against the defendant was given by a witness who before the trial told various parties that he knew nothing whatever against the defendant, a conviction was set aside. *Adams v. State*, 10 Tex. App. 677.

*Character of the Defendant.*

"In criminal proceedings, the fact that the person accused has a good character is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible." Stephen's Dig. Evid., Art. 56.

*Evidence of good character.* — *Com. v. Gazzolo*, 123 Mass. 220; *Edgington v. U. S.*, 164 U. S. 361; *Com. v. Cleary*, 135 Pa. St. 64; *Jackson v. State*, 81 Wis. 127; *People v. Harrison*, 93 Mich. 594; *State v. Howell*, 100 Mo. 628; *State v. Rodman*, 62 Iowa, 456.

*Evidence of bad character.* — *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Hull*, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609; *People v. Fair*, 43 Cal. 137; *Com. v. Sacket*, 22 Pick. (Mass.) 394; *Com. v. Hardy*, 2 Mass. 303, 317; *Com. v. O'Brien*, 119 Mass. 345.

That a defendant's character is relevant and actually tends to show the probability of the act of which he is accused cannot be doubted. *R. v. Stannard*, 7 C. & P. 674; *R. v. Rowton*, Leigh & C. 520; *Cancemi v. People*, 16 N. Y. 506; *State v. Lee*, 22 Minn. 409.

Evidence of the good character of the defendant is admissible in his favor in all criminal prosecutions. *People v. Stewart*, 28 Cal. 395; *People v. VanDam*, 107 Mich. 425; *State v. Northrup*, 48 Iowa, 584; *Com. v. Webster*, 5 Cush. 295; *State v. Hice*, 117 N. C. 782.

The character must be as to points which would tend to show that it was unlikely that the defendant committed the crime in question. *Com. v. Nagle*, 157 Mass. 554; *Griffin v. State*, 14 Ohio St. 55.

The character which may be proved is not the character in general of the accused, but those specific traits of his character that would have a bearing upon the commission of the particular crime. *Morgan v. State*, 88 Ala. 224; *Kee v. State*, 28 Ark. 155; *People v. Fair*, 43 Cal. 137; *People v. Chrisman*, 135 Cal. 282; *State v. Bloom*, 68 Ind. 54.

Defendant's reputation as a good soldier is not relevant in a prosecution for murder. *People v. Garbutt*, 17 Mich. 9.

One accused of murder may prove his reputation for peace and quietude. *House v. State* (Tex.), 57 S. W. 825.

In a prosecution for having carnal knowledge of a woman under the age of consent, the defendant may prove his "reputation for morality, virtue, and honesty in living." *State v. Snover*, 63 N. J. L. 383.

In bastardy proceeding the accused may prove his previous good character for morality. *Hawkins v. State*, 1 Zab. 630; *Dally v. Woodbridge*, 1 Zab. 491.

In a prosecution for adultery, evidence of the good character for chastity of the woman with whom the adultery was alleged to have been committed is admissible. *Com. v. Gray*, 129 Mass. 474.

#### *General Reputation, not Particular Acts.*

Testimony as to the defendant's good character must be confined to general reputation and cannot include specific acts. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Com. v. O'Brien*, 119 Mass. 342, 345, 20 Am. Rep. 325; *Com. v. Harris*, 131 Mass. 336. Compare *Com. v. Robinson*, Thacher Cr. Cas. 230; *Snyder v. Com.*, 85 Pa. St. 519; *McQueen v. State*, 108 Ala. 54; *Berneker v. State*, 40 Neb. 810; *Betts v. Lockwood*, 8 Conn. 488, 489; *State v. Ferguson*, 71 Conn. 227.

#### *Reputation, not Disposition.*

"Assuming, then, that evidence was receivable to rebut the evidence of good character, the second question is, Was the answer which was given in this case, in reply to a perfectly legiti-

mate question, such an answer as could properly be left to the jury? (*Q.* 'What is the defendant's general character for decency and morality of conduct?' *Ans.* 'I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality.' The defendant was charged with indecent assault upon a boy.) Now, in determining this point, it is necessary to consider what is the meaning of character. Does it mean evidence of general reputation or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question, What is the tendency and disposition of the prisoner's mind? put directly." *R. v. Rowton*, 1 L. & C. 520. See criticism of this case below.

"The subject character is considered at length in *R. v. Rowton*, 1865, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R. v. Rowton*, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction." Stephen's *Dig. Evid.*, Appendix, note xxv.

Although it has often been said that the term "Character" includes both one's real disposition and his reputation for having such disposition (see *Powers v. Leach*, 26 Vt. 278), yet in so far as it is to be used as an evidentiary fact to establish the doing or the not doing of an act, it means the real disposition only. Reputation is only a fact from which one's real character is to be

inferred, and from his real character is to be inferred the probability of his having acted in a certain manner.

The rule that one's character must be established by proof of his reputation merely is based upon the idea, not that they are the same thing, but that this mode of proof is less objectionable than that which depends upon the individual opinion of witnesses. *Bottomis v. Kent*, 3 Jones L. 160; *State v. Lee*, 22 Minn. 409.



## CHAPTER VI.

### RULES OF INDUCTION SPECIALLY APPLICABLE TO CIRCUMSTANTIAL EVIDENCE.

ALL reasoning concerning human conduct is essentially a process of induction, of which it is the object, by means of generalizations founded upon a knowledge of the faculties, emotions, and laws of the mind, to discover the moral qualities and causal origin of the voluntary actions of our fellow-men ; whence it follows that the rules for the conduct of inductive inquiry belong formally to the province of LOGIC, or the science of the laws of thought. The rules of evidence are therefore a selection of maxims tacitly assumed and acted upon by all men in the ordinary affairs of life, and recognized by philosophical wisdom and judicial experience as the best means of discovering truth. The purpose of this essay requires the enumeration only of such few leading rules of evidence as are of special, though not of exclusive application, to the particular subject-matter of this treatise.

RULE 1.—*The facts alleged as the basis of any legal inference must be clearly proved, and beyond reasonable doubt connected with the factum probandum.* This rule is an indispensable condition of all sound induction ; and its object is, by proper rejections and exclusions, and after as many negations as are necessary (*a*), to verify facts and clear them from all

(*a*) Bacon, *Novum Organum*, Lib. i., Aph. cv. ; Mill's *Logic*, Book V., chs. 2 and 3.

ambiguity, so that they may become the premises of logical argument and reasoning. In moral investigations the facts are generally more obscurely developed than when physical phenomena form the subjects of inquiry ; and they are frequently blended with foreign and irrelevant circumstances, so that the establishment of their connection with the *factum probandum* becomes matter of considerable difficulty. No weight therefore must be attached to circumstances which, however they may excite conjecture, do not warrant belief. Occurrences may be mysterious and justify even vehement suspicion, and yet the supposed connection between them may be but imaginary, and their co-existence indicative of accidental concurrence merely, and not of mutual correlation. "Where there is nothing but the evidence of circumstances to guide you," said Mr. Justice Bailey, "those circumstances ought to be *closely and necessarily* connected, and to be made as clear as if there were absolute and positive proof" (*b*). Every circumstance therefore which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support, must be rejected from the judicial balance ; in other words, it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation (*c*).

(*b*) *Rex v. Downing*, Salop Summer Ass. 1822, the next case *infra*. Epithets require to be watched : "absolute or positive proof" can mean only proof such as reasonably induces the conviction of certainty. See p. 262, *infra*.

(*c*) *Traité de la Preuve*, par Mittermaier, ch. 55 and 57.

The following cases will serve to manifest the dangerous consequences which may ensue from the disregard of this most salutary cautionary rule.

Two brothers-in-law, Joseph Downing and Samuel Whitehouse, met by appointment to shoot, and afterwards to look at an estate, which on the death of Whitehouse's wife without issue would devolve on Downing. They arrived at the place of meeting on horseback, Downing carrying a gun-barrel and leading a colt. After the business of the day, and after drinking together some hours, they set out to return home, Downing leading his colt as in the morning. Their way led through a gate opening from the turnpike road, and thence by a narrow track through a wood. On arriving at the gate, Downing discovered that he had forgotten his gun-barrel; and a man who accompanied them to open the gate went back for it, returning in about three minutes. In the meantime Whitehouse had gone on in advance; and the prisoner, having received his gun-barrel, followed in the same direction. Shortly afterwards Whitehouse was found lying on the ground in the wood, at a part where the track widened, about 600 yards from the gate, with his hat off, and insensible from several wounds in the head, one of which had fractured his skull. While the person by whom he was discovered went for assistance, the deceased had been turned over and robbed of his watch and money. About the same time Downing was seen in advance of the spot where the deceased lay, proceeding homeward and leading his colt; and a few minutes afterwards two men

were seen following in the same direction. Suspicion attached to Downing, partly from his interest in the estate enjoyed by the deceased, and he was put upon his trial for this supposed murder; but it was clear that he had no motive on that account to kill the deceased, as the estate was not to come to him until after failure of issue of the deceased's wife, to whom he had been married several years, without having had children; so that it was his interest that the way should not be opened to a second marriage. That the deceased had been murdered at all, was a highly improbable conjecture, and it was far more probable that he had fallen from his horse and received a kick, especially as his hat bore no marks of injury, so that it had probably fallen off before the infliction of the wounds. That the deceased, if murdered at all, had been murdered by the prisoner was in the highest degree improbable, considering how both his hands must have been employed, nor was there any evidence that the deceased had been robbed by the prisoner. It thus appeared, that these accumulated circumstances, of supposed inculpatory presumption, were really irrelevant and unconnected with any *corpus delicti* (e). The prisoner was acquitted; and it is instructive that about twelve months afterwards, the mystery of the robbery, the only real circumstance of suspicion, was cleared up. A man was apprehended upon offering the deceased's watch for sale, and brought to trial for the theft of it, and acquitted, the judge thinking that he ought not to be called upon, at so distant a period, to account for

(e) *Rex v. Downing*, Salop Sum. Ass. 1822, *coram* Bayley, J.

the possession of the deceased's property, which he might have purchased, or otherwise fairly acquired, without being able to prove it by evidence. The accused, when no longer in danger, acknowledged that he had robbed the deceased, whom he found lying drunk on the road, as he believed ; but that he had concealed the watch, on learning that it was supposed that he had been murdered, in order to prevent suspicion from attaching to himself.

A farmer was tried under the special commission for Wiltshire, in January 1831, upon an indictment which charged him with having feloniously sent a threatening letter, which was alleged to have been written by him. That the letter was in the prisoner's handwriting was positively sworn by witnesses who had had ample means of becoming acquainted with it, while the contrary was as positively asserted on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the scale appears to have been turned by the circumstance that the letter in question, and two others of the same kind sent to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper ; the ragged edges of the different portions exactly fitting each other, and the water-mark name of the maker, which was divided into three parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for life. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was brought

to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. He then wrote on a piece of paper from memory a copy of the contents of the anonymous letter, which on comparison left no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little; and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so, he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and he had the prisoner tried upon a second indictment for sending a similar letter, when the son admitted in the witness box writing and sending all the three letters in question, and the father was at once acquitted. The son was subsequently indicted for the identical offence which had been imputed to the father: he pleaded guilty, and was sentenced to transportation for seven years. It appeared that he had had access to the bureau, which was commonly left open. The writing of the letter constituted in fact the *corpus delicti*; there having been no other evidence to inculcate the prisoner as the *sender* of the letter, which would however have been the natural and irresistible inference if he had been the *writer*. The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, but foreign, as it turned out, to the *factum* in question; and considering that other persons had access to the bureau, its

weight as a circumstance of suspicion seems to have been overrated (*f*).

But, perhaps, the most extraordinary and instructive case of this kind that has ever occurred was that of Abraham Thornton, who was tried at the Warwick Autumn Assizes, 1817, before Mr. Justice Holroyd, for the alleged murder of a young woman, who was found dead in a pit of water about seven o'clock in the morning, with marks of violence about her person and dress, from which it was supposed that she had been violated, and afterwards drowned. The deceased's bonnet and shoes and a bundle were found on the bank of the pit. Upon the grass, at a distance of forty yards, there was the impression of an extended human figure, and a large quantity of blood was upon the ground near the lower extremity of the figure, where there were also the marks of large shoe-toes. Spots of blood were traced for ten yards in a direction leading from the impression to the pit, upon a footpath, and about a foot and a half from the path upon the grass on one side of it. When the body was found, there was no trace of any footstep on the grass, which was covered with dew not otherwise disturbed than by the blood; from which circumstances it was insisted that the spots of blood must have fallen from the body while being carried in some person's arms. Upon the examination of the body, about half a pint of water and some duckweed were found in the stomach, so that the deceased

(*f*) *Rex v. Isaac Looker, Rex v. Edward Looker*, Ann. Reg. 1831 (Chr.) p. 9; and see Selections from the charges of Mr. Baron Alderson

must have been alive when immersed in the water. There were lacerations about the parts of generation, but nothing which might not have been caused by sexual intercourse with consent. Soon after the discovery of the body, there were found in a newly harrowed field adjoining that in which the pit was situate, the recent marks of the right and left footsteps of the prisoner and also of the footsteps of the deceased, which, from the length and depth of the steps, indicated that there had been running and pursuit, and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken, her footsteps and those of the prisoner proceeded together, walking in a direction towards the pit and the spot where the impression was found, until the footsteps came within the distance of forty yards from the pit, when from the hardness of the ground they could be no longer traced. The marks of the prisoner's running footsteps were also discovered in a direction leading from the pit across the harrowed field ; from which it was contended that he had run alone in that direction after the commission of the supposed murder. The mark of a man's left shoe (but not proved to have been the prisoner's) was discovered near the edge of the pit, and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had had sexual intercourse with the deceased, but alleged that it had taken place with her own consent.

The defence set up was an *alibi*, which, notwithstanding these apparently decisive facts, was most

satisfactorily established. The prisoner and the deceased had met at a dance on the preceding evening at a public-house, which they left together about midnight. About three in the morning they were seen talking together at a stile near the spot, and about four o'clock the deceased called at the house of Mrs. Butler, at Erdington, where she had left a bundle of clothes the day before. Here she appeared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of an hour. Her way home lay across certain fields, one of which had been newly harrowed, and adjoined that in which the pit was situate. The deceased was successively seen after leaving Mrs. Butler's house by several persons, proceeding alone in a direction towards her own home, along a public road where the prisoner, if he had rejoined her, could have been seen for a considerable distance; the last of such persons saw her within a quarter of an hour afterwards, that is to say, before or about half-past four. At about half-past four, and not later than twenty-five minutes before five, the accused was seen by four persons, wholly unacquainted with him, walking slowly and leisurely along a lane leading in an opposite direction from the young woman's course towards her home. About a mile from the spot where the prisoner was seen, he was seen by another witness about ten minutes before five, still walking slowly in the same direction, with whom he stopped and conversed for a quarter of an hour, after which, at twenty-five minutes past five, he was again seen walking towards his father's house,

which was distant about half a mile. From Mrs. Butler's house to the pit was a distance of upwards of a mile and a quarter; and allowing twenty minutes to enable the deceased to walk this distance, would bring the time of her arrival at the pit to twenty-five minutes before five; whereas the prisoner was first seen by four persons above all suspicion at half-past four or twenty-five minutes before five, and the distance of the pit from the place where he was seen, was two miles and a half.

Upon the hypothesis of his guilt, the prisoner must have rejoined the deceased after she left Mrs. Butler's house, and a distance of upwards of three miles and a quarter must have been traversed by him, accompanied for a portion of it by the deceased, and the pursuit, the criminal intercourse, the drowning, and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty or twenty five minutes. The defence was set up at the instant of the prisoner's apprehension, which took place within a few hours after the discovery of the body, and was maintained without contradiction or variation before the coroner's inquest and the committing magistrates, and also upon the trial, and no inroad was made on the credibility of the testimony by which it was supported. The various timepieces to which the witnesses referred, and which differed much from each other, were carefully compared on the day after the occurrence and reduced to a common standard, so that there could be no doubt of the real times as spoken to by them. Thus, it was not within the

bounds of possibility that the prisoner could have committed the crime imputed to him ; nevertheless, public indignation was so strongly excited that his acquittal, though it afforded a fine example of the calm and unimpassioned administration of justice, occasioned great public dissatisfaction.

There was nevertheless a total absence of all conclusive evidence of a *corpus delicti*, which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself, in a moment of remorse, after parting from her seducer, terrified beyond control by the presence in the light of day of so many visible marks of her downfall. It was possible that she might have sat down to change her dancing-shoes for the boots which she had worn the preceding day and carried in her bundle, and fallen into the water from exhaustion ; for she had walked to and from market in the morning, had exerted herself in dancing in the evening, and had been wandering all night in the fields without food. The allegation that the prisoner had violated the deceased, and therefore had a motive to destroy her, was mere conjecture ; and from the circumstance of her having been out all night with the prisoner, with whom she was previously unacquainted, and from the state of the garments which she took off at Mrs. Butler's, as compared with those for which she exchanged them, it was clear that the sexual intercourse had taken place before she called there, at which time she made no complaint, but appeared composed and cheerful. Again, the inference contended for, from the state of the grass, with drops of blood upon it

where the dew had not been disturbed, was equally groundless ; for there was no proof that the dew had not been deposited after the drops of blood ; and it clearly appeared that the footsteps of the prisoner and the deceased could not be traced on other parts of the grass where, beyond all doubt, they had been together in the course of the night. Now, suppose that the *alibi* had been incapable of satisfactory proof, that the prisoner had not been seen after parting from the deceased, and that the inconclusiveness of the inference suggested from the discovery of drops of blood on the grass, where there were no footmarks, had not been manifested by the absence of those marks in other places where they had unquestionably been together in the night, —the guilt of the prisoner would have been considered indubitable, and his execution certain ; and yet these exculpatory circumstances were entirely collateral, and independent of the facts which were supposed to be clearly indicative of guilt (*g*).

Two other cases, equally remarkable, though not so well known, may be instanced as instructive illustrations alike of the fallibility of human testimony, particularly as to identification of persons,

(*g*) The brother of the deceased brought an appeal of murder, in which the defendant tendered wager of battle, and the proceedings led to the abolition, by St. 59 Geo. III. c. 46, of that barbarous relic of feudal times. See *Ashford v. Thornton*, 1 B. & Ald. 405 ; Short-hand Rep., and Observations upon the case of Abraham Thornton, by Edward Holroyd, Esq., where the judge's notes of the evidence are given. There is another report of the case and the subsequent proceedings in the Court of King's Bench, printed at Warwick, 1818. See also 1 Woodall's Celebrated Trials, p. 1, and there is an account of the case of a more popular character, and obviously partial, in 6 Celebrated Trials, p. 227.

and of the fact that the most cogent circumstances of suspicion are sometimes capable of a perfectly satisfactory explanation.

A young man named Pook was tried at the Central Criminal Court in 1871 for the murder of Jane Maria Clousen. Evidence was given on behalf of the Crown to the following effect. The deceased, a girl of seventeen, had been servant in the house of the prisoner's father at Greenwich, where the prisoner also lived. On the 11th of April she went to stay with friends. On Tuesday, the 25th of April, she was in High Street, Deptford, at 6.40. At 4.15 A.M. next day she was found in a dying state in Kidbrooke Lane with her head beaten in. On the 27th of April a hammer covered with blood and hair was found near the scene of the murder in the direction of prisoner's home. A metal whistle was found about fifteen yards from the scene of the murder, and it was proved that the prisoner was in the habit of using a similar whistle. The *post-mortem* examination showed that the girl was pregnant. Several persons swore that a young man in a dark coat and light trousers bought a hammer similar to the one produced at a shop kept by a man named Thomas, on Monday, the 24th, at about 7.45 P.M., and two of them deposed that this man was the prisoner. Two witnesses swore that on the evening of Tuesday, the 25th of April, they saw the prisoner in Kidbrooke Lane in company with a girl, one of them at about 6.40 P.M., the other at about 8.45 P.M. Two other witnesses saw him running into Greenwich at about

9 P.M. A few minutes later he entered a shop at Greenwich in a very hot and muddy condition, and brushed his clothes there. The shirt and trousers worn by the prisoner on that day had some spots of blood on them. Some time between the 23rd and 30th of April, he had shaved off his moustache, and had told some girls he had done so for some private theatricals, which was untrue. On Sunday, the 23rd of April, he had told the same girls that he was going to London on the Tuesday evening, whereas his defence was that he had gone to Lewisham. It may be remarked that this evidence, if unanswered, contains all the elements necessary for a complete circumstantial proof; the *corpus delicti*, motive, possession of the means of crime, other inculpatory facts such as the whistle, spots of blood on his clothes, identification near the scene on the night in question, and his running home; there was also evidence of falsehoods told as to his intended movements upon the night in question, with a suggested attempt at disguise.

The evidence for the defence was equally complete. Prisoner was subject to fits, and was constantly watched by his family, and they saw no signs of any intimacy which would supply the motive suggested for the murder. On the evening of Monday, 24th, prisoner was with his brother the whole evening and did not go to Thomas's shop. Thomas's books only showed the sale of one hammer that day or near it, and the purchaser was called. The prisoner never had a pair of light trousers in his life, and was shown to

have had his whistle after the murder. His whole family saw him at home on Tuesday evening till about 7.20, and again soon after 9. Several independent witnesses saw him on Lewisham Bridge from about 8.0 till 8.30. According to the defence he had gone there to meet his sweetheart, who had failed to come, and after waiting about forty minutes, he had run back to Greenwich, arriving there by nine o'clock. The blood on his clothes was reasonably accounted for, one witness had noticed it on his shirt on the day preceding the murder. He had shaved his moustache *four days* after the murder and it had not sufficiently changed his appearance to effect any disguise. Having had some flirtation with one of the girls called, he naturally would not say he was going to Lewisham after another young woman. The prisoner was acquitted (*h*).

A German named Franz was indicted for the murder of Martha Halliday. Deceased was the caretaker of Kingswood Rectory, four miles from Reigate. On Monday, the 10th of June, 1861, she was left alone in the house after about 6 P.M. Next morning she was found dead on the floor of her bedroom in her night-dress. Death was caused by suffocation, a stocking having been thrust into her mouth apparently as a gag. Her hands and feet had been tied with a peculiar kind of cord. No

(*h*) *Reg. v. Pook*, *coram* Bovill, L.C.J., C.C.C. 1871. See Times, July 13-17, 1871, and *Pook v. Crosland*, Times, February 2 and 3, 1872. As in Thornton's case, popular feeling ran very high against Pook—largely in consequence of sensational anticipations of the evidence in the newspapers.

property was missing, the thieves having probably been disturbed. Footprints outside showed that two men had made several attempts to get into the house, finally entering by the window of the deceased's bedroom. Near the body was found a packet of papers consisting of certificates of birth and baptism, and a passport, all belonging to the prisoner, and containing his personal description; also a begging letter signed Adolphe Krohn, a letter from Mlle. Tietjens, the singer, and a list of addresses. In the room was found a rough stick broken off a tree. Early in July the prisoner was arrested in London, where he was passing under a false name. Evidence was given for the prosecution to the following effect: About noon on Sunday, the 9th of June, two foreigners took lodgings at "The Cricketers," at Reigate. On Monday, the 10th of June, they purchased a ball of cord of peculiar make, the same as that with which the deceased woman had been bound. Another piece of the same kind was found tied round a shirt left by the prisoner at his London lodgings when he was arrested. This cord was so unusual that it could not be matched except at the Reigate shop and at the maker's. Various persons identified the prisoner more or less positively as one of the two foreigners at Reigate. He was the taller and fairer, the other was short and dark. At 4 P.M. on the Monday (10th of June) the foreigners left "The Cricketers." Later that day they were seen going from Reigate towards Kingswood; about 7 P.M. two men who spoke a foreign language were seen about a mile from Kingswood Rectory under a beech-tree,

which corresponded with the broken stick found. At about the same time two foreigners were seen going from the beech-tree towards the Rectory, but the witness who met them declared that he had met the same two men at an hour on Sunday afternoon when the Reigate foreigners were undoubtedly at "The Cricketers."

No evidence of an *alibi* was forthcoming, though the prisoner professed to have been in London at the date of the murder. The story he told the police on the 8th of July was as follows. He had landed at Hull and set out to walk to London. On the way he had fallen in with two compatriots, one of whom was named Adolphe Krohn, the other William Gerstenberg, who was about prisoner's height and colour and who kept importuning him to give him papers of identification. Prisoner refused, but one night while he was asleep, the other two went off with his bag, containing his papers and a suit of clothes like those that he was wearing. The papers included those found at Kingswood and also a testimonial and a certificate of confirmation. On arriving in London he learned from the newspapers that he was accused of murder, and in alarm changed his name. In support of this story it was proved by independent evidence that on the 9th of July a tramp brought to a local J.P. the testimonial and certificate mentioned by prisoner, with his diary from his landing in Hull till he lost his bag. They were picked up in Northamptonshire. It was also shown that he had arrived in Hull with a bag, but had none when apprehended. Mlle. Tietjens had given her letter to a German

calling himself Adolphe Krohn, who resembled the prisoner but was not the same man. Prisoner stated that the piece of cord with which his shirt was tied up was picked up by him near his lodgings in Whitechapel. This was close to the factory where it was made, and other cord like it was picked up at the same spot by a witness called for the defence. The prisoner was acquitted (*i*).

RULE 2.—*The burden of proof is always on the party who asserts the existence of any fact which infers legal accountability (k).* This is a universal rule of jurisprudence, founded upon evident principles of justice; and it is a necessary consequence, that the affirmant party is not absolved from its obligation because of the difficulty which may attend its application. No man can be justly deprived of his social rights without proof that he has committed some act which legally involves the forfeiture of them. The law respects the *status in quo*, and regards every man as legally innocent until the contrary be proved. To prove a negative is in most cases difficult, in many impossible. Criminality therefore is never to be presumed. But nevertheless the operation of this rule may, to a certain extent, be modified by circumstances which create a counter-obligation, and shift the *onus probandi*. Lord Brougham, speaking of principles that were applicable to all cases, but especially to such as

(*i*) *Reg. v. Franz*, Croydon Summer Assizes, 1861, *coram* Blackburn, J. See Times, August 7, 1861. Ann. Reg. 1861, p. 138.

(*k*) 1 Starkie's L. of Ev. 162; 1 Greenleaf's L. of Ev. pt. ii. c. 3. The proposition is equally true of every fact whether implying responsibility or not.

rest upon circumstantial evidence, said that "the burthen of the proof often shifts about from one party to the other in the process of a cause, according as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences" (l). It follows, from the very nature of circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction (m). Lord Ellenborough said that no person accused of crime is bound to offer any explanation of his conduct, or of circumstances of suspicion which attach to him ; but nevertheless, if he refuse to do so, where a strong *primâ facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest (n). It is therefore a qualification of the rule in question, that "in every case the *onus probandi* lies on the person who is interested to

(l) *Waring v. Waring*, 6 Moore's P. C. Rep. at p. 355.

(m) *Per* Abbott L.C.J. in *Rex v. Burdett*, 4 B. & Ald. 161.

(n) *Rex v. Lord Cochrane and others*, 1814, Shorthand Report by Gurney. See p. 99 *supra*.

support his case by a particular fact, which lies more particularly within his own knowledge, or of which he is supposed to be cognizant. This indeed is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true" (o). It has been well observed, that in such case we have something like an admission that the presumption is just (p). "In drawing an inference or conclusion, from facts proved," said Lord Chief Justice Abbott (q), "regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or of contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The

(o) *Per* Holroyd, J., in *Rex v. Burdett*, 4 B. & Ald. 140

(p) *Per* Best, J. *ib.* 122.

(q) *Ibid.* 161; and see the language of Bayley, J., *ib.* 150.

premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know that where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement." To the same effect Lord Chief Justice Tindal, on a trial for high treason, said, that "the offence charged against the prisoner must be proved by those who make the charge. The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of the guilt that is given by the Crown. It is not however an unreasonable thing," said the learned judge, "and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence (r)." But this

(r) *Reg. v. Frost*, Monmouth Sp. Comm. Jan. 1840, Gurney's Shorthand Report, 689; and see the language of Lord Ellenborough in *Rex v. Despard*, 28 St. Tr. 521; and in *Rex v. Watson*, 32 *ib.* 583.

doctrine, it has been well observed, is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution (*s*).

It is a necessary consequence of this rule, rather than a substantive rule, that the *corpus delicti* must be clearly proved before any effect is attached to circumstances supposed to be inculpatory of a particular individual; but this is a branch of the subject of so much importance and of such comprehensive extent, as to require consideration in a separate chapter.

RULE 3.—*In all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits.* The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence when he has it in his power to produce it; of which some interesting exemplifications appear in other parts of this Essay (*t*). This rule applies *à fortiori* to circumstantial evidence, a kind of evidence which, for reasons which have been already urged, is inherently inferior to direct and positive testimony; and therefore whenever such evidence is capable of being adduced, the very attempt to substitute a description of evidence not of the same degree of force, necessarily creates a suspicion that it is withheld from corrupt and sinister motives (*u*). Nor is

(*s*) *Per* Shaw, C. J., in *Prof. Webster's Case*, Bemis's Report, p. 467; see p. 109, *supra*, for other references to this case.

(*t*) See Ch. iii., ss. 5, 7, pp. 81 and 111, *supra*. (*u*) See p. 37 *supra*.

the application of the rule confined to the proof of the principal fact; it is "the master rule which governs all the subordinate rules" (x) and applies alike to the proof of every individual constituent fact, whether principal or subordinate. Thus, in a trial for murder, Mr. Baron Maule refused to receive evidence of the contents of a coffin-plate in order to establish the identity of the deceased, on the ground that, being removable, it might have been produced, and there being no other case of identity, stopped the case (y). The rule is however necessarily relaxed where its application becomes impracticable by the act of the party who would otherwise be entitled to claim its protection; as where a witness is kept out of the way by or on his behalf (z), or where a deed or other instrument in his possession is withheld by him after notice to produce (a). Similarly the rules of law allow secondary instead of primary evidence to be given where, from circumstances over which neither party has control, the production of the primary evidence is actually or practically impossible, as where an original document has been lost, or is of such a nature that it cannot reasonably be moved, such as an inscription on a tombstone or a writing on a wall (b). On like principles, it is enacted by statute that where a

(x) Burke's Works: Report of the Committee of the House of Commons appointed to inspect the Lords' Journals in relation to their proceeding in the trial of Warren Hastings, Esquire, under the heading, "Debates on Evidence." Ed. Rivington, 1822, vol. xiv., p. 377. (y) *Reg. v. Edge*, Chester Spr. Ass. 1842.

(z) Hawk. P. C. Bk. 2. c. 46. s. 15; *Reg. v. Scaife*, 20 L. J., M. C. 229; 17 Q. B., 238. See *Rex v. Harrison*, 12 St. Tr. at col. 852.

(a) *Rex v. Hunter*, 3 C. & P. 591; 4 *ib.*, 128; *Rex v. Haworth*, 4 C. & P. 254; and see Ch. iii. s. 7, p. 111, *supra*.

(b) *Mortimer v. McCallan*, 6 M. & W., 67.

witness is dead, or too ill to travel, his deposition may be read to the jury (*c*).

Considering, moreover, the inherent infirmity of human memory, in the fair construction and application of this rule, evidence ought in all criminal cases, and *à fortiori* in cases of circumstantial evidence, to be received with caution, wherever any considerable time has elapsed since the commission of the alleged offence. The justice and efficacy of punishment, and more especially of capital punishment, inflicted after the lapse of any considerable interval, at least where the offender has not withdrawn himself from the reach of justice, are often questionable (*d*). An unavoidable consequence of great delay is, that the party is deprived of the means of vindicating his innocence, or of proving the attendant circumstances of extenuation; the crime itself becomes forgotten, or is remembered but as matter of tradition, and the offender may have become a different moral being: in such circumstances punishment can seldom, perhaps never, be efficacious for the purpose of example. On these accounts judges and juries are now always reluctant to convict parties charged with offences committed long previously.

(*c*) The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, s. 17)

(*d*) See *Rex v. Horne*, executed at Nottingham in 1759, for the murder of his natural child forty years before; 4 Celebrated Trials, 396; and *Rex v. Wall*, 28 St. Tr. 51, whose execution took place after the lapse of twenty years from the commission of the offence; and see the strictures of Lord Campbell on this case, *Lives of the Chief Justices*, vol. iii., p. 147, and *Rex v. Roper*, Leicester Sum. Ass. 1836. Roper was tried for a murder committed 34 years before, but was acquitted on the ground that he had made a mere mad confession. See Ann. Reg. 1836, p. 285.

RULE 4.—*In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.* This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. The awards of penal law can be justified only when the strength of our convictions is equivalent to moral certainty ; which, as we have seen, is that state of the judgment, grounded upon an adequate amount of appropriate evidence, which induces a man of sound mind to act without hesitation in the most important concerns of human life. In cases of direct credible evidence, that degree of assurance immediately and necessarily ensues ; but in estimating the effect of circumstantial evidence, there is of necessity an ulterior intellectual process of inference which constitutes an essential element of moral certainty. The most important part of the inductive process, especially in moral inquiries, is the correct exercise of the judgment in drawing the proper inference from the known to the unknown, from the facts proved to the *factum probandum*. A number of secondary facts of an inculpatory moral aspect being given, the problem is, to discover their causal moral source, not by arbitrary assumption, but by the application of the principles of experience in relation to the immutable laws of human nature and conduct. It is not enough, however, that a particular hypothesis will explain all the phenomena ; nothing must be inferred merely because, if true, it would account for the facts ; and if the circumstances are

equally capable of solution upon any other reasonable hypothesis, it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty ; and they must therefore be discarded as conclusive presumptions of guilt. Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of innocence must therefore be rigorously examined and successively eliminated ; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted (*e*). In a case before the Court of Justiciary at Edinburgh, the Lord Justice Clerk Cockburn said that the matter might remain most mysterious, wholly unexplained ; they might not be able to account for it on any other supposition than that of the prisoner's guilt ; but that still that supposition or inference might not be a ground on which they could safely and satisfactorily rest their verdict against her (*f*). It seems, however, hardly possible to conceive of such a state of facts, unless somewhere in the chain of evidence some serious link was wanting ; so that the proved facts although consistent so far as they went only with guilt, still failed to establish it. If however the hypothesis fulfils the required conditions, the conclusion is no longer a gratuitous assumption, but becomes, as it were, part of the induction ; and an additional test is obtained, by which, as by the application of a theorem of verification, the conclusion may be tested, and, if true, corroborated and confirmed ;

(*e*) See *Traité de la Preuve*. Par Mittermaier, Ch. 59.

(*f*) *Reg. v. Madeleine Smith*, see pp. 300-310, *infra*.

since, if it be true, it must harmonise with, and satisfactorily account for, all the facts, to the exclusion of every other reasonable hypothesis. In accordance with these sound principles of reasoning and inference, Lord Chief Baron Macdonald said that he had ever understood the rule as to circumstantial evidence to be that where the circumstances are true, where they are well connected, where they support each other in a clear and lucid manner, and where they cannot reasonably be accounted for unless the charge be true that is imputed to the prisoner, then the jury were justified in convicting upon that evidence (*g*). On another occasion the same learned judge said that the nature of circumstantial evidence was this, that the jury must be satisfied that there is no rational mode of accounting for the circumstances, but upon the supposition that the prisoner is guilty (*h*). Mr. Baron Alderson, with more complete exactness, said, that to enable the jury to bring in a verdict of guilty, it was necessary, not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw (*i*). In *Humphreys' case*, Lord Meadowbank said to the jury, "Your duty is to consider what is the reasonable inference to be drawn from the whole circumstances; in short, whether it is possible to explain the circumstances upon grounds consistent with the innocence to the panel, or whether, on the contrary, they do not necessarily lead to a result directly the reverse" (*k*).

(*g*) *Rex v. Smith*, for arson, see p. 39, *supra*.

(*h*) *Rex v. Patch*, Surrey Spr. Ass. 1805. See pp. 390 395, *infra*

(*i*) *Rex v. Hodges*, 2 Lewin, C. C. 227.

(*k*) *Swinton's Rep.*, p. 353. See p. 201, *supra*.

It follows, as a consequence of this rule, that wherever several persons are jointly charged with any offence, either the joint complicity of all must be proved, or it must be left in no doubt which out of two or more actually committed the offence. In the case of the two Mannings their counsel severally endeavoured to throw the guilt exclusively on the other; and Lord Chief Baron Pollock told the jury that if they thought one of the prisoners was guilty, but could not possibly decide which was the guilty party, they might be reduced to the alternative of returning a verdict of not guilty as to both; but, that if, looking at the whole transaction, they came to the conclusion that both must, according to the ordinary course of human affairs, have been concerned in the murder, it would be their duty to find both the prisoners guilty (*l*).

A learned author thinks that almost all writers have attempted to estimate the force of evidence upon a wrong principle; that the true principle is to estimate its value entirely by the effect which it does in fact produce upon the minds of those who hear it, and that the value of evidence is measured as exactly by the state of mind which it produces, as a force is measured by the weight which it will lift (*m*). But, not to dwell upon the fallacy of every attempt to compare the conclusions of moral reasoning with the constrained and inevitable consequence of mechanical force, this would be to give up a safe, practical, and philosophic test, the validity and

(*l*) *Reg. v. Manning and Wife*, C. C. C., Oct. 1849 (for murder).

(*m*) See an able and interesting essay on the characteristics of English Law, *Camb. Ess.* 1857, p. 27.

sufficiency of which are recognised in every other branch of philosophical and scientific research, for an indeterminate and empirical standard incapable of independent verification, and would virtually justify the most erroneous determinations of the tribunals. One reason why hearsay evidence is excluded is that it is very often calculated to produce, and, if admitted, certainly would often produce, with persons unaccustomed to weigh evidence, an effect wholly unjustifiable.

RULE 5.—*If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.* In other words, there must be no uncertainty as to the reality of the connection of the circumstances of evidence with the *factum probandum*, or as to the sufficiency of the proof of the *corpus delicti*, or, supposing those points to be satisfactorily established, as to the personal complicity of the accused. This is in strictness hardly so much a distinct rule of evidence as a consequence naturally flowing from, and virtually comprehended in, the preceding rules. Indeed, it is more properly a test of the right application of those rules to the facts of the particular case. The necessity and value of such a test are manifest from the consideration of the numerous fallacies incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the impossibility in all cases of drawing the line between moral certainty and doubt. In questions of civil right the tribunal will often decide according to the greatest amount of probability in favour of one or the other of

the litigant parties ; but where life or liberty are in the balance, it is neither just nor necessary that the accused should be convicted but upon conclusive evidence (*n*). While it is certain that circumstantial evidence is frequently most convincing and satisfactory, it must never be forgotten, as was remarked by that wise and upright magistrate, Sir Matthew Hale, that “persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt (*o*)” ; wherefore, as he justly concludes, “this kind of evidence must be very warily pressed.” Many adverse appearances may be outweighed by a single favourable one, and all the probabilities of the case may not be before the court. The Lord Justice Clerk Cockburn, in his charge in the case of Madeleine Smith, before mentioned, said, “I wish you to keep in mind that although you may not be satisfied with any of the theories that have been propounded on behalf of the prisoner, still nevertheless the case for the prosecution may be radically defective in evidence” (*p*). It is safer, therefore, as wisely said by Sir Matthew Hale, to err in acquitting than in convicting, and

(*n*) This sentence has been left substantially as written ; but it points rather to a certain inevitable infirmity in human judgment than to any real or inherent difference between the search after truth in civil and criminal cases, and it hardly seems consistent with much that follows. Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him ; and yet all the rules of law that apply to the one case apply to the other, and the processes are the same. The difference in result is not logical—but human nature is made up of a good deal besides logic, and “*naturam expellas furca, tamen usque recurret.*”

(*o*) 2 P. C. ch. 39 ; *Rex v. Thornton*, pp. 244–249, *supra*, is a remarkable illustration of this.

(*p*) pp. 300–310, *infra*.

better that five guilty persons should escape unpunished than that one innocent person should die (*g*). Paley controverts the maxim, and urges that "he who falls by a mistaken sentence may be considered as falling for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden" (*r*). There is no judicial enormity which may not be palliated or justified under colour of this execrable doctrine, which is calculated to confound all moral and legal distinctions; its sophistry, absurdity, and injustice have been unanswerably exposed by one of the ablest of lawyers and most upright of men (*s*). Justice never requires the sacrifice of a victim; an erroneous sentence is calculated to produce incalculable and irreparable mischief to individuals, to destroy all confidence in the justice and integrity of the tribunals, and to introduce an alarming train of social evils as the inevitable result. Every consideration of truth, justice, and prudence requires, therefore, that where the guilt of the accused is not incontrovertibly established, however suspicious his conduct may have been, he shall be freed from legal accountability. No rule of procedure is more firmly established, as one of the great safeguards of truth and innocence, than the rule in question; and it is the invariable practice of judges to advise juries to acquit whenever they entertain any fair and reasonable doubt. The doubt however must be not

(*g*) 2 P. C. c. 39.

(*r*) Moral and Political Philosophy, book vi., ch. 9 (at the end).

(*s*) Romilly's Obs. on the C. L. of England, 72; Best on Presumptions, p. 292.

a trivial one, such as speculative ingenuity may raise, but a conscientious one which may operate upon the mind of a rational man acquainted with the affairs of life (*t*). "If," said Lord Chief Baron Pollock to the jury, "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty" (*u*).

The rules of evidence, as founded on reason and consecrated in the judgments of the courts, constitute the best means for discovering truth, and are an integral part of our legal system, essential alike for private and social security. Nevertheless, language of most dangerous tendency in regard to them has occasionally fallen from learned judges, which implies that they may be modified, according to the enormity of the crime, or the weightiness of the consequences which attach to conviction. Lord Finch, afterwards Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said, "The fouler the crime is, the clearer and the plainer ought the proof to be" (*x*). "The more flagrant the crime is," said Mr. Baron Legge, "the more clearly and satisfactorily you will expect that it should be made out

(*t*) *Per* Parke, B. in *Reg. v. Tawell*, see pp. 313-317, *infra*.

(*u*) *Reg. v. Manning and Wife*, C. C. C., Oct. 1849; and see the language of Lord Meadowbank in *Reg. v. Humphreys*, referred to and quoted p. 264, *supra*; and of Shaw, C. J., in *Prof. Webster's Case*, p. 109, *supra*, Bemis's Rep. 470.

(*x*) 7 St. Tr. 149, and see *Rex v. Crossfield*, 26 St. Tr. 218.

to you " (y). Mr. Justice Holroyd is represented to have said, that " the greater the crime, the stronger is the proof required for the purpose of conviction " (z).

Upon a trial for high treason, Lord Chief Justice Dallas, after adverting to the extreme guilt of the crime, as seeking the subversion of the established government, and aiming at the property, the liberty, and the lives of all, said, " Still, however, nothing will depend upon the comparative magnitude of the offence ; for be it great or small, every man standing in the situation in which the prisoner is placed, is entitled to have the charge against him clearly and satisfactorily proved ; with only this difference (and I make the observation at the outset, as being in favour of the prisoner), that in proportion to the magnitude of the offence, and the consequences which result from his conviction, ought the proof to be clear and satisfactory " (a). In the case of the Glasgow cotton-spinners for conspiracy and murder, the learned Lord Justice Clerk Boyle said, that the magnitude of the charge ought to have no other effect than rendering it more necessary that the jury should be fully satisfied that the evidence is clear upon the subject (b). The distinction was more broadly laid down by the late Lord Justice Clerk Cockburn, in Madeleine Smith's case (c). " In

(y) *Rex v. Blandy*, 18 St. Tr. 1186.

(z) *Rex v. Hobson*, 1 Lewin, C. C. 261.

(a) *Rex v. Ings*, 33 St. Tr. 1135.

(b) *Reg. v. Hanson and others*, Court of Justiciary, 1838 ; Short-hand Rep. 366.

(c) Pp. 300-310, *infra*.

drawing an inference," said the learned judge, "you must always look to the import and character of the inference which you are asked to draw"; and the same distinction pervades the whole of the charge in that celebrated case.

These dicta are opposed to the principles of reason, and inconsistent with all established rules of law. No legal doctrine is more firmly settled than that there is no difference between the rules of evidence in civil and criminal cases; but if under any circumstances they may be relaxed according to notions of supposed expediency, they cease to be, in any correct and intelligible sense, rules for the discovery of truth, and the most valued rights of civilized men become the sport of chance. The logical consequences of any such power of relaxation would be, that the rules of evidence are radically different in civil and criminal cases, and different even in criminal cases, as they are applied to particular classes of crime, according to some arbitrary and imaginary measure for estimating their relative enormity or penal consequence. Is the dictum, it may be asked, to be restricted to cases where the consequence of conviction may be loss of life? Is it to be repudiated when it may be followed by the inferior penalties of imprisonment or penal servitude? Is it to be applied or rejected in application in the numerous cases, civil as well as criminal, where physical and social consequences may follow, which, though of a different kind, may be scarcely less fatal to the individual than loss of liberty, or even of life itself? And if the maxims of evidence may be

made more stringent in one direction, there is no reason why they may not be relaxed in another, according to the greater difficulties incidental to the proof of the more atrocious and dangerous forms of crime, as some writers on the civil law have actually maintained. A distinguished historical writer, with the strictest philosophical truth, and with great felicity of illustration, has thus denounced the doctrine under review :—  
“The rules of evidence no more depend on the magnitude of the interests at stake than the rules of arithmetic. We might as well say that we have a greater chance of throwing a size when we are playing for a penny, than when we are playing for a thousand pounds, as that a form of trial which is sufficient for the purposes of justice, in a matter affecting liberty and property, is insufficient in a matter affecting life. Nay, if a mode of proceeding be too lax for capital cases, it is, *à priori*, too lax for all others; for in capital cases the principles of human nature will always afford considerable security. No judge is so cruel as he who indemnifies himself for scrupulosity in cases of blood, by license in affairs of smaller importance. The difference in tale on the one side far more than makes up for the difference in weight on the other” (*d*).

(*d*) Macaulay's Essays: “Hallam's Constitutional History.” Ed. Longmans', 1852, vol. i. p. 143. See, however, p. 267, *supra*, note (*n*).

## AMERICAN NOTES.

[NOTE TO CHAPTER VI.]

### *Clear Proof of Facts Required.*

"The several circumstances upon which conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof; and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged, so as to create or divert suspicion and prevent the discovery of the truth." *Com. v. Webster*, 5 Cush. 295-317.

### *Subsidiary Facts — Links in Chain.*

Where the facts from which the guilt of the defendant is to be inferred actually depend one upon the other as do the links in a chain; where the failure of any one destroys the value of all the rest, — each one must be proved beyond a reasonable doubt, but not otherwise. *State v. McKee* (Utah), 53 Pac. 723.

It is the guilt of the accused that must be established beyond a reasonable doubt, and not every subsidiary or collateral fact involved. *Williams v. People*, 166 Ill. 132; *Hank v. State* (Ind.), 46 N. E. 127; *Bradshaw v. State*, 17 Neb. 147; *Houser v. State*, 58 Ga. 78; *State v. Hayden*, 45 Iowa, 11; *Lackey v. State*, 67 Ark. 416.

Each fact essential to the inference of guilt must be proved beyond any reasonable doubt, but not each fact that is not thus essential. It is enough if the facts as a whole exclude any reasonable conclusion, except that of the defendant's guilt. They must, as a whole, convince beyond any reasonable doubt. *State v. Rome*, 64 Conn. 329; *Gavin v. State* (Fla.), 29 So. 405.

"Circumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other, or a number of independent circumstances all pointing in the same direction. In the former case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. In the latter case the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond a reasonable doubt." *State v. Austin* (N. C.), 40 S. E. 415.

Every fact that is *essential* to warrant an inference of guilt must be proved beyond a reasonable doubt, but this is not true of every fact that is offered. A fact may be proved merely because it tends to establish the guilt of the accused, and that guilt may be sufficiently proved even though this fact never existed. Hence, if this fact need not be shown at all, it certainly need not be proved beyond a reasonable doubt. *Bradshaw v. State*, 17 Neb. 147 (quoted in note to Chapter I.) ; *People v. Willett*, 105 Mich. 110 ; *People v. Hare*, 57 Mich. 505.

It is not necessary that each circumstance in the chain be proved beyond a reasonable doubt. *Breck v. State*, 4 Ohio Circ. Ct. 160, 21 Weekly Law Bulletin, 204.

#### *Burden on One Asserting.*

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist." *Stephen's Dig. Evid.*, Art. 93.

#### *Best Evidence Rule.*

Greenleaf states the rule as follows: "A fourth rule which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact ; but its design is to prevent the introduction of any which from the nature of the case supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud ; for when it is apparent that better

evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information. But where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." *Greenleaf on Evid.*, 16th ed., § 82.

But the application of the rule in this place and of the phrase "best evidence" is criticised by later authorities. The editor of the 16th edition remarks:

"That phrase, as already explained, is of no service as a concrete rule for dealing with a given piece of evidence; it is used to describe loosely the general policy underlying certain concrete rules, which, however, are entirely independent of each other, in history and in theory, and must be discriminated." *Greenleaf on Evid.*, 16th ed., § 97 a.

The editor, Professor Wigmore, then goes on to say that the underlying concrete rules above referred to are the Parol Evidence rule governing the proof of the contents of a writing, the Hearsay rule excluding hearsay because evidence on oath and under cross-examination is better, the Attesting Witness rule, supposed rules requiring eye-witnesses before others, and rules requiring the official reports and records.

Also in Thayer's *Prelim. Treatise on Evidence* it is said:

[The rule] "is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed, it would probably have dropped naturally out of use long ago if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts, and does not hold out in its application; and in so far as it does apply, it is unnecessary and un-instructive. It is roughly descriptive of two or three rules which

have their own reasons and their own name and place, and are well enough known without it."

"One of the general rules of evidence of universal application is that the best evidence of the disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degrees of proof, speaking in a more general and enlarged sense of the terms." *Clifton v. U. S.*, 4 How. 247.

Testimony as to the ownership of a stolen animal, which in itself shows that there is better evidence not produced, is objectionable. *Butler v. State*, 3 Tex. App. 48.

A witness may testify from memory the amount of goods stolen, even though the way-bills would show the exact amount stored in the depot. *Davis v. State (Ga.)*, 32 S. E. 158.

#### *Proof of Former Testimony.*

Oral evidence of what a witness swore to at an inquest is the best evidence obtainable when what the witness said was not reduced to writing. *Nelson v. State*, 32 Ark. 192; *Lyons v. People*, 137 Ill. 602; *Brown v. State*, 71 Ind. 470.

But when a record of the evidence was made in regular manner at the inquest, it must be produced. *Robinson v. State*, 87 Ind. 292; *State v. Zellers*, 7 N. J. L. 220.

#### *Weak Witnesses.*

The rule requiring the best evidence refers to quality and not to quantity, but does not exclude a weak witness merely because a strong one might have been produced. *Richardson v. Milburn*, 17 Md. 67.

Any one who saw the fact may testify, though one not called might be a better witness than the one testifying. *Richardson v. Milburn*, 17 Md. 67; *Canfield v. Johnson*, 144 Pa. 61.

#### *Direct Evidence Preferred to Circumstantial.*

Where direct evidence can be had there should be no conviction on circumstantial evidence alone. *Chisolm v. State*, 45 Ala. 66; *Terr. v. Hanna*, 5 Mont. 248.

At least the absence of such direct evidence should be accounted for after reasonable effort to obtain it. *Porter v. State*, 1 Tex. App. 394.

And it is a sufficient explanation that the witnesses are without the State. *Scott v. State*, 19 Tex. App. 325.

Where a certain person witnessed the perpetration of a crime, a conviction will not be sustained where such person was not called as a witness, and the failure to call him is not satisfactorily accounted for. *Terr. v. Hanna*, 5 Mont. 248.

*Presumption from Failure to Produce.*

The rule that where a party does not produce evidence which is in his power to produce, the jury is authorized to conclude that it would be damaging to such party, is not the same thing as the rule requiring the best evidence. For a discussion of this rule, see Chapter III. and note.

Proving a fact by inferior evidence when better evidence is in the possession of the party warrants an inference that the latter would not be in favor of his contention. *Insur. Co. v. Evanns*, 9 Md. 1.

*Facts Proved not Consistent with Innocence in General.*

"Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion." *Greenleaf on Evid.*, § 34.

Chief Justice Shaw, in *Com. v. Webster*, 5 Cush. 295, at page 313, says: "The common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain."

In *State v. Hill*, 65 Mo. 84, the following instruction was approved: "The jury are instructed that they may from circumstantial evidence alone find the defendant guilty, when the facts established are inconsistent with any other theory than that of his guilt, but in order to find the defendant guilty from circumstantial evidence the facts proven must be wholly inconsistent with the innocence of the accused and incapable of explanation upon any

other reasonable hypothesis than that of his guilt; and before the jury can find the defendant guilty they must believe and find from the evidence that the circumstances proven in the case are not only inconsistent with the innocence of the accused and reconcilable only upon the ground of his guilt, but they must further find that no satisfactory explanation of said circumstances has been rendered by the evidence of the defendant."

In *State v. Rollins*, 113 N. C. 722, it was held no error to refuse the following instruction: "If there is a reasonable hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit." This would seem to be contrary to the rule of the text.

*All Reasonable Hypotheses Other than Guilt Must be Excluded.*

All other reasonable hypotheses than the guilt of the accused must be excluded by the evidence to a moral certainty. *Morgan v. State* (Neb.), 71 N. W. 788; *Bryant v. State* (Ala.), 23 So. 40; *State v. Matthews*, 66 N. C. 106. And the proof need not be *absolutely* incompatible with other hypotheses. *Mitchell v. State* (Ala.), 22 So. 71; *James v. State*, 45 Miss. 572.

Evidence that does not exclude every other reasonable inference except the guilt of the accused is not sufficient to sustain a conviction (*People v. Nelson*, 85 Cal. 421; *State v. Johnson*, 19 Iowa, 230; *Kennedy v. State*, 31 Fla. 428; *State v. Hunter*, 50 Kan. 302; *People v. Foley*, 64 Mich. 148); but it need not exclude every other possible hypothesis. *People v. Ward*, 105 Cal. 335; *People v. Murray*, 41 Cal. 66; *King v. State* (Ala.), 25 So. 178.

A conviction cannot be sustained where all the circumstances implicating the defendant in a homicide are entirely consistent with his innocence and his abandonment of a previous expressed intention to kill. *Fuller v. State*, 112 Ga. 539.

In *Gilmore v. State* (Tex.), 13 S. W. 646, where the defendant was charged with horse-stealing, a conviction was not sustained because none of the circumstances proved were inconsistent with the defendant's innocence.

The Court will instruct that if the circumstances are reconcilable with innocence there can be no conviction. *Moore v. State*,

2 Ohio St. 500. A mere strong probability is not enough. If the facts are fairly to be reconciled on the theory of innocence there is a reasonable doubt. *Clark v. State*, 12 Ohio, 483, 495.

Where defendant charged with arson had advised one having hay in the barn to take it out, because something was liable to happen, and several months before had advised one living close by to insure her furniture, it was held that these facts were as consistent with innocence as with guilt. *People v. Doneburg*, 64 N. Y. Supp. 438.

*Incompatibility of Some One Circumstance with Guilt.*

Where any fact established is wholly incompatible with the inference of the defendant's guilt, he should be acquitted. *U. S. v. Reder*, 69 Fed. Rep. 965; but see *State v. Johnson*, 37 Minn. 493; and *People v. Willett*, 105 Mich. 110.

"The next rule to which I ask attention is, that all the facts proved must be consistent with each other, and with the main fact sought to be proved. When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail." *Com. v. Webster*, 5 Cush. 295, 318.

*Absolute Impossibility of Innocence.*

It need not be proved to be absolutely impossible that any other person than the defendant could have committed the crime charged. *Com. v. Leach*, 156 Mass. 99.

The evidence need not establish the guilt of the accused to the "exclusion of every possibility of innocence." *Burks v. State* (Ala.), 23 So. 530.

It is not error to refuse an instruction that the facts and circumstances proved must be "absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other

than that of the guilt of the accused." *Horn v. State* (Wyo.), 73 Pac. 705.

*Burden of Proof in Criminal Cases — General Authorities.*

*Miles v. U. S.*, 103 U. S. 304; *Nevling v. Com.*, 98 Pa. St. 322; *People v. Paulsell*, 115 Cal. 6; *Morgan v. State*, 48 Ohio St. 371; *Wade v. State*, 71 Ind. 535; *Jameson v. People*, 145 Ill. 357; *Porterfield v. Com.*, 91 Va. 801; *People v. Ezzo*, 104 Mich. 341; *Com. v. Goodwin*, 14 Gray (Mass.), 55; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Com. v. Hardiman*, 9 Gray (Mass.), 136; *Com. v. McKie*, 1 Gray (Mass.), 61; *State v. Schweitzer*, 57 Conn. 539; *Hoyt v. Danbury*, 69 Conn. 348.

The presumption that life continues relieves the State of showing by positive evidence that life continued up to the moment of the fatal blow. *Com. v. Harman*, 6 Pitts. Leg. J. 120.

The burden of proving that a confession is voluntary is on the State. *State v. Young*, 67 N. J. L. 223; *Roesel v. State*, 62 N. J. L. 216; *Nicholson v. State*, 38 Md. 140.

*Guilt to be Proved beyond a Reasonable Doubt.*

"If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action." Stephen's Dig. Evid., Art. 94.

The Court, where no requests were made by the prisoner, charged that it was incumbent upon the State to satisfy the jury beyond a reasonable doubt of the guilt of the accused, but omitted to say that the accused was presumed to be innocent until proven guilty, and omitted also to define "reasonable doubt." *Held*, that the defendant had no just ground for complaint. *State v. Smith*, 65 Conn. 283.

*Proof beyond a Reasonable Doubt Defined.*

*State v. Williamson*, 22 Utah, 248; *State v. Davis* (Del.), 50 Atl. 99.

Where the Court charged that a reasonable doubt was one that you can give a reason for, not captious or whimsical doubt, there

was held to be error. *Morgan v. State*, 48 Ohio St. 371. Proof beyond a reasonable doubt is stronger than clear proof. *Farrer v. State*, 2 Ohio St. 54, 77.

"You have been told that to doubt of the prisoner's guilt is to acquit her. But a doubt, to work an acquittal, must be serious and substantial—not the mere possibility of a doubt. If the evidence convince you of guilt beyond a reasonable doubt, you are bound to convict. You are the judges of its effect; and if you can reconcile it to any reasonable hypothesis of innocence, you may acquit; if not, you are bound to say so." Charge of Gibson, C. J., in *Com. v. Harman*, 4 Pa. 269, 274.

"Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delicti*, as it is termed, or the offence committed as charged; and in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

"Then what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt

remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." *Com. v. Webster*, 5 Cush. 295, 319.

The *corpus delicti* must be established beyond a reasonable doubt, but not by "overwhelming proof." *Zell v. Com.*, 94 Pa. 258.

*Moral Certainty Required.*

Absolute certainty is not essential to conviction, but moral certainty is. *Otmer v. People*, 76 Ill. 149.

*Doubt on the Part of One Juror.*

The fact that one of the jurors has a reasonable doubt does not invalidate a verdict in case he yields to the other eleven. *Pickens v. State (Ala.)*, 22 So. 551; *Davis v. State (Neb.)*, 70 N. W. 984.

The proper charge is that the jury, and not each juror, should be convinced beyond reasonable doubt. *Davis v. State*, 63 Ohio St. 173, 10 Circ. Dec. 738.

*Amount of Evidence Required to Exclude Reasonable Doubt.*

The defendant cannot be convicted of larceny upon evidence that merely raises a suspicion of his guilt. *Munroe v. State*, 111 Ga. 831.

Evidence that the defendant was seen driving a cow, like the one he is alleged to have stolen, toward his slaughter pen, and that her hide and horns were found there later, is sufficient to sustain a conviction for larceny. *Turner v. State*, 111 Ga. 217.

In *Tilley v. Com.*, 90 Va. 99, the Court held that the following evidence did not establish the defendant's guilt beyond a reason-

able doubt. The defendant and the deceased, a young woman, were seen to enter certain woods together, later a shot was heard, and some time after the defendant was seen alone on a road not far away. The body of the young woman was found with a bullet-hole in her head, and the defendant had had a pistol which might have inflicted the wound. A purse with \$30, which the deceased had had, was gone. The defendant was in danger of lynching, and fled, concealing himself in another State for three years. When arrested he showed no anxiety and refused to escape when opportunity offered. The shoes worn by him at the time could not have made certain tracks about the scene of the crime. He had no need whatever of money.

If there is doubt as to which of two persons struck the blow, and both cannot be guilty, the jury should acquit. *State v. Goode* (N. C.), 43 S. E. 502.

It is not necessary to compare circumstantial evidence in weight as equal to that of one credible witness or more; it is sufficient that it demonstrates the guilt of the accused beyond a reasonable doubt. *Faulk v. State*, 52 Ala. 415; *State v. Coleman*, 22 La. Ann. 455.

*Particular Facts to be Proved.*

Where defendant is charged with causing the death of deceased by procuring an abortion, it must be proved beyond a reasonable doubt that the deceased was pregnant. It need not be absolutely certain. *State v. Alcorn* (Idaho), 64 Pac. 1014.

The accused must be identified as the criminal beyond a reasonable doubt. *Patton v. State*, 117 Ga. 230.

The rule requiring proof beyond a reasonable doubt applies also to the proof of the degree of a homicide. *Terr. v. Manton*, 7 Mont. 162; *State v. Agnew*, 10 N. J. L. 165; *Blake v. State*, 3 Tex. App. 581; *Tate v. State*, 35 Tex. Cr. Rep. 231.

Malice and deliberation must be proved beyond a reasonable doubt to sustain a conviction for murder in the first degree. *State v. Greenleaf*, 71 N. H. 606.

Where the stomach of one deceased has been examined by a chemist to detect poison as the cause of death, it must be shown beyond a reasonable doubt that the stomach examined was that of the deceased in question, and that no foreign substance was introduced into it between the time of death and the examination. But

it need not have been kept under lock and key or have been kept sealed up. *State v. Cook*, 17 Kan. 392.

In prosecutions for seduction the good repute of the prosecutrix for chastity must be established beyond a reasonable doubt. *State v. Brown*, 64 N. J. L. 414; *Zabriskie v. State*, 43 N. J. L. 646.

Where defendant in possession of money belonging to another alleged that he found it and intended to return it, the prosecution must disprove such explanation beyond a reasonable doubt. *White v. State*, 28 Tex. App. 71.

The burden of proving, in murder, that the deceased did not commit suicide is on the prosecution. *Persons v. State*, 90 Tenn. 291.

#### *In Larceny.*

The identity of the defendant charged with larceny must be proved, not by a preponderance of the evidence, but beyond a reasonable doubt. *State v. McCracken*, 66 Iowa, 569.

The property alleged to have been stolen must be identified as belonging to some one other than the accused beyond a reasonable doubt. *State v. Hill*, 96 Mo. 357.

To justify a conviction for grand larceny the value of the goods taken must be proved beyond a reasonable doubt. *State v. Wood*, 46 Iowa, 116.

#### *Prima Facie Case — Burden on Defendant.*

Where the defendant inflicted a fatal wound with a deadly weapon previously in his possession with practically no provocation, a *prima facie* case is established, and the burden of producing evidence of mitigating circumstances is on the defendant. *Horton v. Com.*, 99 Va. 848.

Guilt must be proved beyond a reasonable doubt, and the burden of such proof is in the State throughout the trial; but when the homicide has been shown with no justifying or mitigating circumstances, the defendant has at least the burden of producing sufficient evidence of such circumstances to raise a reasonable doubt. *People v. Callaghan*, 4 Utah, 49; *People v. Arnold*, 15 Cal. 476.

Where the body is found and identified, if the defendant claims that the man alleged to have been murdered is still alive, it de-

volves upon him to show it by satisfactory evidence. *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753.

Where the killing has been proved beyond a reasonable doubt and the evidence of the State indicates no circumstances in mitigation, the defendant has the burden of producing sufficient evidence of such circumstances to raise a reasonable doubt as to his guilt. *People v. Matthai*, 135 Cal. 442.

### *Exculpatory Facts.*

The defendant is not required to prove exculpatory facts beyond a reasonable doubt (*Dyson v. State*, 13 Tex. App. 402); nor even by a preponderance of the evidence. *Tweedy v. State*, 5 Iowa, 433; *Howell v. State* (Neb.), 85 N. W. 289.

The defendant, charged with larceny of goods, recently stolen and found in his possession, need not rebut the presumption arising therefrom by a preponderance of the evidence. He need only raise a reasonable doubt. *State v. Richart*, 57 Iowa, 245; *Hyatt v. State* (Tex.), 25 S. W. 291.

Proof of good character alone may be sufficient to raise a reasonable doubt. *Com. v. Bargar*, 2 Law. T. (N. S.) 37; *Becker v. Com.*, 9 Atl. 510; *Com. v. Shaub*, 5 Lanc. Bar, 121; *Com. v. Harmon*, 199 Pa. 521.

### *Mitigating Circumstances.*

It is undoubtedly better use of the term to say that the burden of proof rests throughout the trial on the prosecution to prove the fact that a crime has been committed and that the defendant is guilty; this would make it the duty of the prosecution to establish the absence of circumstances of mitigation or justification. But when the State has proved a homicide and the fact that the defendant did the act producing death, and none of the circumstances proved indicate self-defence, the *burden of producing evidence* of such circumstances is on the defendant. It is often said, however, that the burden of proof is on the defendant to establish self-defence. *Miller v. State*, 107 Ala. 40; *State v. Snelbaker*, 8 Ohio Dec. 466.

The burden of proving mitigating circumstances is not on the defendant, although if the evidence of the State shows no such

circumstances the burden of producing evidence of them is on the defendant. *Alexander v. People*, 96 Ill. 96; *People v. Callaghan*, 4 Utah, 49; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *McDaniel v. State*, 8 Smedes & M. (Miss.) 401; *Hawthorne v. State*, 58 Miss. 778; *People v. Hill*, 49 Hun, 432; *People v. Downs*, 56 Hun, 5; *Goodall v. State*, 1 Ore. 333, 80 Am. Dec. 396; *Richardson v. State*, 9 Tex. App. 612; *Same v. Same*, 32 Tex. Cr. Rep. 524, 24 S. W. 894; *State v. Tabor*, 95 Mo. 585 (where it is said that the burden of proof is then on the defendant); *State v. Bertrans*, 3 Ore. 61 (same); *Gibson v. State*, 89 Ala. 121 (same); *State v. Keith*, 9 Nev. 15 (same); *State v. Mazon*, 90 N. C. 676 (same); *Terr. v. McAndrews*, 3 Mont. 158; and *Terr. v. Rowand*, 8 Mont. 110 (same under statute).

The burden is on the prosecution to show the killing, the malice, and the lack of justification or excuse. *People v. Downs*, 56 Hun, 5; *Goodall v. State*, 1 Ore. 333, 80 Am. Dec. 396; *Jones v. State*, 13 Tex. App. 1.

The jury may be charged that the evidence of the State may be such as to put the burden of producing evidence of justification or mitigation upon the defendant. *Bell v. State*, 69 Ga. 752.

Where the evidence of the State indicates that the homicide may be manslaughter instead of murder, the jury should so find without any evidence on the part of the accused (*Reid v. State*, 50 Ga. 556); and in such case the burden of proving the mitigating circumstances is not on the accused. *Tweedy v. State*, 5 Iowa, 433.

It is generally held to be error to instruct the jury that when a homicide has been proved the burden of proving mitigating circumstances is on the accused, unless the charge further states "unless they appear from the evidence proved against him." *McDaniel v. State*, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; *Hawthorne v. State*, 58 Miss. 778; *Com. v. Webster*, 5 Cush. 295; *Murphy v. People*, 37 Ill. 447; *contra*, *Cathcart v. Com.*, 37 Pa. 108.

In *Trumble v. Terr.*, 3 Wyo. 280, 6 L. R. A. 384, it was held error to charge the jury that after the killing is proved with no evidence of mitigating circumstances, "the burden then falls upon the defendant to show either that such killing was justifiable or

excusable, or that it was attended by such facts as would limit such killing to the crime of manslaughter."

*Same — Burden Said to Be on Defendant.*

Cases where it is said that the burden is on defendant to show justification, or mitigating circumstances, or accident in homicide. *State v. Jones*, 98 N. C. 651; *State v. Mazon*, 90 N. C. 676; *Terr. v. Rowand*, 8 Mont. 110; *State v. Rollins*, 113 N. C. 722; *Lewis v. State*, 88 Ala. 11; *Lewis v. State*, 90 Ga. 95; *State v. Bonds*, 2 Nev. 265.

The burden is said not to be on the State to show that there was no justification for a homicide. *State v. Brown*, 64 Mo. 367.

Burden is on the accused to show that he killed the deceased to prevent him from committing murder. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

Where defendant is charged with manslaughter by producing an abortion, the burden of proving that the abortion was necessary to preserve life is on the defendant. *People v. McGonegal*, 62 Hun, 622.

The defendant has the burden of proving by a preponderance of the evidence that a homicide was justifiable. *People v. Raten*, 63 Cal. 421; *People v. Tidwell*, 4 Utah, 506, 12 Pac. 61 (under statute).

The California Code places the burden of proving mitigating or justifying circumstances on the defendant in certain cases. *People v. Tarm Poi*, 86 Cal. 225; but see *People v. Powell*, 87 Cal. 348, where it is held that the defendant need not show by a preponderance of the evidence that a homicide was justifiable. And see also *People v. Lemperle*, 94 Cal. 45.

Where the evidence of the State indicates murder, the burden of proving mitigating circumstances, not by a preponderance of the evidence, but to the satisfaction of the jury, is put on the accused. A doubt as to such mitigating circumstances is to be resolved against him. *State v. Byers*, 100 N. C. 512.

Defendant must show affirmatively the homicide was excusable or accidental or not malicious unless it already appears to be so from the evidence of the prosecution. *Dixon v. State*, 13 Fla. 636; *Murphy v. People*, 37 Ill. 447.

Homicide is presumed to be murder, and the burden of show-

ing it to be a crime of less degree is on the accused. *Com. v. Drum*, 58 Pa. 9.

Mitigating circumstances need not be established beyond a reasonable doubt, but the jury must be satisfied they are true. *State v. Ellick*, 60 N. C. 450, 86 Am. Dec. 442.

*Insanity — Burden on Defendant to Prove beyond Reasonable Doubt.*

Where insanity is set up as a defence, most courts put the burden of proving it upon the defendant. A few require him to prove it beyond a reasonable doubt. *State v. De Rance*, 34 La. Ann. 186, 44 Am. Rep. 426.

*Insanity — Preponderance Required of Defendant.*

Many other courts require the defendant to establish his insanity by a preponderance of the evidence, or to the satisfaction of the jury. *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642 ; *State v. Adin*, 7 Ohio Dec. 25 ; *State v. Lawrence*, 57 Me. 574 ; *State v. Huting*, 21 Mo. 464 ; *Graves v. State*, 45 N. J. L. 203, 347 ; *Pannell v. Com.*, 9 Lanc. Bar (Pa.), 82 ; *Boswell v. Com.*, 20 Gratt. (Va.) 860.

Burden of proving insanity by a fair preponderance of the evidence is on the accused (*Com. v. Wireback*, 190 Pa. 138 ; *Com. v. Bezek*, 168 Pa. 603 ; *Com. v. Heidler*, 191 Pa. 375 ; *Ortwein v. Com.*, 76 Pa. 414 ; *Lynch v. Com.*, 77 Pa. 205 ; *Com. v. Kilpatrick*, 204 Pa. 218) ; but he need not prove it "beyond a reasonable doubt." *Meyers v. Com.*, 83 Pa. 131.

On an indictment for crime, the defence being insanity, such insanity must be proved by a preponderance of evidence, in order to obtain an acquittal. *Kelch v. State*, 55 Ohio St. 146.

The absence of motive raises no presumption of insanity. *Carter v. State*, 12 Tex. 500.

The burden of proving insanity as a defence is on the accused, because of the presumption of sanity. *McKenzie v. State*, 26 Ark. 334.

Insanity as a defence must be affirmatively proved ; the jury must be satisfied that the defendant was not sane. *State v. Lawrence*, 57 Me. 574 ; *State v. De Rance*, 34 La. Ann. 186, 44 Am.

Rep. 426 ; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539 ; *State v. Baber*, 11 Mo. App. 586.

*Insanity — Burden on State.*

And many courts leave the burden of proving sanity upon the prosecution and hold that the jury should acquit the defendant if they have a reasonable doubt of his sanity. *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382 ; *State v. Crawford*, 11 Kan. 32 ; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117 ; *Dove v. State*, 50 Tenn. 348.

The State does not have the burden of proving sanity beyond a reasonable doubt. *Graves v. State*, 45 N. J. L. 203.

In *State v. Crawford*, 11 Kan. 32, it was held that the State must establish defendant's sanity beyond a reasonable doubt.

*Self-Defence — Preponderance Required of Defendant.*

There are many jurisdictions that require the defendant to establish the fact that he acted in self-defence by a preponderance of the evidence. This, of course, is putting the burden of proof on him. *U. S. v. Kan-gi-shun-ca*, 3 Dak. 106 ; *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480 ; *People v. Riordan*, 117 N. Y. 71 ; *Silvus v. State*, 22 Ohio St. 90 ; *State v. Bertrand*, 3 Ore. 61 ; *State v. Brown*, 34 S. C. 41 ; *State v. Jones*, 20 W. Va. 764.

The burden of proving that the act was done in self-defence is on the defendant (*Silvus v. State*, 22 Ohio St. 90 ; *Roden v. State*, 97 Ala. 54 ; *Smith v. State*, 86 Ala. 28 ; *Weaver v. State*, 24 Ohio St. 584 ; *Com. v. Drum*, 58 Pa. 9), unless the evidence of the State has already brought out facts from which the jury may infer self-defence. *People v. Hong Ah Duck*, 61 Cal. 387 ; *De Arman v. State*, 71 Ala. 351 ; *Lyons v. People*, 137 Ill. 602.

Self-defence must be established by the defendant by a preponderance of the testimony. *State v. Welch*, 29 S. C. 4.

The State has not the burden of proving that the accused had another means of escape from the deceased ; he must show that he had none. *Cleveland v. State*, 86 Ala. 1 ; *Stitt v. State*, 91 Ala. 10, 24 Am. St. Rep. 853.

*Self-Defence — Burden on State.*

Logically it would seem that the defendant ought to be acquitted if his evidence raises a reasonable doubt that he may have acted in self-defence, and many authorities so hold. *Miller v. State*, 107 Ala. 40; *State v. Porter*, 34 Iowa, 131; *McKenna v. State*, 61 Miss. 589; *Tiffany v. Com.*, 121 Pa. 165.

The burden of proving that the accused was not acting in self-defence is on the State (*State v. Donahoe*, 78 Iowa, 486; *State v. Dillon*, 74 Iowa, 653; *People v. Coughlin*, 65 Mich. 704); and in *Same v. Same*, 67 Mich. 466, it was held that the burden of proof was upon the State to show not only that the act was not in self-defence, but that the accused had no reasonable belief that he was in great danger from the deceased. *Gravely v. State*, 38 Neb. 871; *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480; *People v. Riordan*, 50 Hun, 602; *People v. Downs*, 123 N. Y. 558.

The jury should not be instructed that the burden of showing self-defence is on the accused when the evidence of the prosecution already tends to show it. *People v. Elliott*, 80 Cal. 296.

Where defendant killed deceased during a struggle, the burden of proving that the act was not justifiable is on the State. *State v. Cross*, 68 Iowa, 180.

The State must prove beyond a reasonable doubt that the defendant did not act in self-defence. *State v. Bone* (Iowa), 87 N. W. 507.

There is no doubt that the defendant need not prove the fact that he acted in self-defence beyond a reasonable doubt. *People v. Lee* (Cal.), 8 Pac. 685; *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683; *Schaffer v. State*, 22 Neb. 557, 3 Am. St. Rep. 274; *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480; *State v. Ariel*, 38 S. C. 221; *Cockrell v. Com.*, 95 Ky. 22.

*Alibi — Burden of Proof.*

A preponderance of evidence is not necessary of an alibi. The burden of proof is not changed by such a defence. *Walters v. State*, 39 Ohio St. 215; *Morehead v. State*, 34 Ohio St. 212.

Setting up an alibi as a defence does not change the burden of proof. *Fife v. Com.*, 29 Pa. 429; *Briceland v. Com.*, 74 Pa. 463.

As to the weight of evidence in cases where an alibi is set up Chief Justice Shaw says: "In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offence tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offence was committed, it is not sufficient." *Com. v. Webster*, 5 Cush. 295, 324.

*Various Facts — Burden on Defendant.*

In rape, the burden is on the defendant to show that the girl is not of good repute. *Com. v. Allen*, 135 Pa. 483.

In an action for selling goods without a licence, the burden is on the defendant to show that he had one. *Com. v. Brownbridge*, 1 Brewst. 399, s. c. 6 Phila. 318; *Com. v. Dilbo*, 29 Leg. Int. 150.

Before rules applicable to the corroboration of an accomplice are applied, the defendant must show by a preponderance of the evidence that the witness in question was an accomplice. *State v. Smith*, 102 Iowa, 656, 665.

Burden is on defendant to show that the gun he aimed was not loaded and that he knew it was not. *Caldwell v. State*, 5 Tex. 18.

Where a wound was given with murderous intent, the burden of proving that death was due not to the wound but to neglect or malpractice is on the defendant. *State v. Briscoe*, 30 La. Ann. 433; *State v. Scott*, 12 La. Ann. 274. But see *McBeth v. State*, 50 Miss. 81.

Defendant cannot mitigate his offence by laying the death of deceased upon the misconduct or malpractice of the physicians unless it is very clearly shown. *State v. Scott*, 12 La. Ann. 274. The burden of proving such malpractice is on the defendant. *State v. Briscoe*, 30 La. Ann. 433.



## CHAPTER VII

### PROOF OF THE CORPUS DELICTI.

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#### SECTION I.

#### GENERAL DOCTRINE AS TO THE PROOF OF THE CORPUS DELICTI.

EVERY allegation of the commission by any person of legal crime involves the establishment of two distinct propositions ; namely, that an act has been committed from which legal responsibility arises, and that the guilt of such act attaches to a particular individual, though the evidence is not always separable into distinct parts, or applicable to one only of those propositions apart from the other.

Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offences which have never existed, that it is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer an accusation, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti*, either by direct evidence or by irresistible grounds of presumption (a). If it be objected that rigorous proof of the *corpus delicti* is sometimes unattainable, and that the effect of exacting it must be that crimes will occasionally

(a) *Rex v. Burdett*, 4 B. and Ald. at p. 123.

pass unpunished, it must be admitted that such may possibly be the result ; but, it is answered that, where there is no proof, or, which is the same thing, no sufficient legal proof of crime, there can be no legal criminality. In penal jurisdiction there can be no middle term ; the party must be absolutely and unconditionally guilty or not guilty. Nor under any circumstances can considerations of supposed expediency ever supersede the immutable obligations of justice ; and occasional impunity of crime is an evil of far less magnitude than the conviction and punishment of the innocent. Such considerations of mistaken policy led some of the writers on the civil and canon laws to modify their rules of evidence, according to the difficulties of proof incidental to particular crimes, and to adopt the execrable maxim, that the more atrocious was the offence, the slighter was the proof necessary ; *in atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi*. Such, indeed, is the logical and inevitable consequence, when, from whatever motive, the plea of expediency is permitted to influence judicial integrity. The clearest principles of justice require, that whatever the nature of the crime, the amount and intensity of the proof shall in all cases be such as to produce the full assurance of moral certainty (b).

## SECTION 2.

### PROOF OF THE CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE.

BUT it is clearly established, that it is not necessary that the *corpus delicti* should be proved by

(b) See Ch. i. s. 3, p. 5, *supra*.

direct and positive evidence, and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy ; and human tribunals must act upon such indications as the circumstances of the case present, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life : to expect more would be equally needless and absurd.

In Burdett's case (*c*) this subject underwent much discussion. The facts were that in 1819 Sir Francis Burdett published a letter in the newspapers to the Electors of Westminster containing severe strictures upon the behaviour of some troops at Manchester, and calling a meeting at Westminster, presumably to protest against the use of a standing army in times of peace. The language was somewhat violent, and contained the following words, which would attract but little attention at the present day, though quite sufficient to form the basis of an indictment for seditious libel in those days :—"What ! kill men unarmed and unresisting ! and, gracious God, women too, disfigured, maimed, cut down, and trampled upon by dragoons !" At the trial at Leicester Assizes before Mr. Justice Best, the evidence was that the letter was dated the 22nd of August from Kirby Park in Leicestershire, had

(*c*) 4 B. & Ald. 95.

been delivered in London by a friend of the defendant's to one Brookes, who could not say for certain whether it was delivered open or sealed, but that it contained these words "Forward this to Brookes," and had no trace of any seal or postmark. It also appeared that the defendant was in Leicestershire on the 22nd of August, and the following day, and did not leave the county until after the publication of the letter in the newspapers on the 25th of August. The defendant admitted that he wrote the letter. It was contended that there was no evidence of publication in Leicestershire, but the learned judge overruled the objection, and the jury convicted.

Upon an application for a new trial, the court held by a majority, that there was evidence of a publication in Leicestershire even if the letter had been delivered sealed to the Post Office there ; but the discussion turned chiefly upon whether publication in Leicestershire could be *presumed* from the facts proved in evidence, which were uncontradicted by any evidence on the defendant's behalf. Mr. Justice Best said, "When one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none ; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference

between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle" (d). His Lordship added, "It therefore appears to me quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised as to the *corpus delicti*, that it ought to be strong and cogent" (e). Mr. Justice Holroyd said, "No man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proof. The presumptions arising from those proofs should, no doubt, and most especially in cases of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are

(d) 4 B. &amp; Ald., at p. 122.

(e) *Ib.* at p. 123.

either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the facts so presumed be not true, and according as he does or does not produce such contrary evidence" (*f*). Mr. Justice Bayley said, "No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half of the persons convicted of crimes are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there are sufficient premises to warrant the presumption" (*g*). Lord Chief Justice Abbott said, "A fact must not be inferred without premises which will warrant the inference; but if no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup" (*h*). The law on this point was also very emphatically declared by Mr. Baron Parke in

(*f*) 4 B. & Ald. at p. 139.

(*g*) *Ib.* at p. 149.

(*h*) *Ib.* at p. 161.

Tawell's case. His Lordship said, "The jury had been properly told by the counsel for the prosecution, that circumstantial evidence is the only evidence which can in cases of this kind lead to discovery. There is no way of investigating them except by the use of circumstantial evidence; but Providence has so ordered the affairs of men that it most frequently happens that great crimes committed in secret leave behind them some traces, or are accompanied by some circumstances which lead to the discovery and punishment of the offender (*i*); therefore the law has wisely provided that you need not have, in cases of this kind, direct proof, that is, the proof of eye-witnesses, who see the fact and can depose to it upon their oaths. It is impossible, however, not to say that that is the best proof, if that proof is offered to you upon the testimony of men whose veracity you have no reason to doubt; but, on the other hand, it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses. This being a case of circumstantial evidence, I advise you," said the learned judge, "as I invariably advise juries, to act upon a rule, that you are first to consider what facts are clearly, distinctly, indisputably proved to your

(*i*) "*Ces circonstances sont autant de témoins muets, que la Providence semble avoir placés autour du crime, pour faire jaillir la lumière de l'ombre dans laquelle l'agent s'est efforcé d'ensevelir le fait principal; elles sont comme un fanal qui éclaire l'esprit du juge, et le dirige vers des traces certaines, qu'il suffit de suivre pour atteindre à la vérité.*"—*Traité de la Preuve*, par Mittermaier, ch. 53.

satisfaction ; and you are to consider whether those facts are consistent with any other rational supposition than that the prisoner is guilty of the offence. If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that cannot much influence your minds ; for we all know that crimes are committed, and therefore the existence of the crime is no inconsistency with the other circumstances, if those circumstances lead to that result. The point for you to consider is, whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that he has been guilty of the offence ? If you cannot, it is your bounden duty to find him guilty ; if you can, then you will give him the benefit of such a supposition. All that can be required is—not absolute, positive proof—but such proof as convinces you that the crime has been made out " (*k*).

The same general principle prevails with regard to the proof of crimes of every description, and of every element of the *corpus delicti*. Thus, on the trial of a man for stealing pepper, it appeared that on the first floor of a warehouse a large quantity of pepper was kept in bulk, and that the prisoner was met coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same description with

(*k*) *Reg. v. Tawell*, Aylesbury Spr. Ass. 1845, pp. 313-317, *infra*.

that in the room above. On being stopped he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse it could not be proved that any pepper had been taken from the bulk. It was urged on behalf of the prisoner that there must be direct and positive evidence of a *corpus delicti*, and that presumptive evidence was insufficient for that purpose; but the Court for Crown Cases Reserved held that the prisoner had been rightly convicted (*l*). Mr. Justice Maule said that the offence with which the prisoner is charged must be proved, and that involves the necessity of proving that the prosecutor's goods have been taken. But why, continued the learned Judge, is that to be differently proved from the rest of the case? If the circumstances satisfy the jury, what rule is there which renders some more positive and direct proof necessary? And he mentioned the case of a father and two sons, who were convicted of stealing from their employers a quantity of shoes and materials for making shoes, though the prosecutors said their stock was so large that they could not say they had missed any one of the articles alleged to have been stolen (*m*).

But it is not necessary that every individual fact should be indisputably proved. On a trial for forgery, in Scotland, Lord Meadowbank said: "I must tell you that the learned counsel for the panel stated the law incorrectly, when he said that you

(*l*) *Reg. v. Burton*, 23 L. J., N. S., M. C. 52; and see *Reg. v. Dredge*, 1 Cox, 235; and p. 183 *supra*.

(*m*) *Reg. v. Burton* (last note).

must have decisive, irrefragable, and conclusive proof of every point in a case like the present, before finding the instrument to be forged. The law is quite the reverse. You are to take all the evidence together, and you are bound to consider whether it amounts and comes up to affording a moral conviction in your minds equivalent to the positive and direct proof of a fact " (n).

### SECTION 3.

#### APPLICATION OF THE GENERAL PRINCIPLE TO PROOF OF THE CORPUS DELICTI IN CASES OF HOMICIDE.

THE general principles of evidence under discussion are so supremely important in reference to cases of homicide, that it will be expedient to illustrate the application of them at some length.

(1) The discovery of the body necessarily affords the best evidence of the fact of death, and of the identity of the individual, and most frequently also of the cause of death (o). A conviction for murder is therefore never allowed to take place, unless the body has been found, or there is equivalent proof of death by circumstantial evidence leading directly to that result (p), and many cases have shown the danger of a contrary practice. Three persons were executed in the year 1660, for the murder of a person who had suddenly disappeared (q), but about

(n) *Reg. v. Humphreys*, pp. 198-201, *supra*.

(o) *Traité de la Preuve*, par Mittermaier, ch. 24.

(p) *Per Parke, B.*, in *Reg. v. Tawell*, pp. 313-317, *infra*.

(q) *Rex v. Perry*, 14 St. Tr. 1312; and see 11 St. Tr. 463; see also the Scotch case of *Green and others*, 14 St. Tr. 1199, where, in

two years afterwards he reappeared. It appeared that he had been out to collect his mistress's rents, and had been robbed by highwaymen, who put him on board a ship which was captured by Turkish pirates, by whom he was sold into slavery. Sir Matthew Hale mentions a case where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed the body to ashes in an oven, whereupon B. was indicted of murder, and convicted, and executed; and within one year afterwards A. returned, having been sent beyond sea by B. against his will; "and so," that learned writer adds, "though B. justly deserved death, yet he was really not guilty of that offence for which he suffered" (*r*). Lord Coke also gives the case of a man who was executed for the murder of his niece, who was afterwards found to be living, of which the particulars have been given in a former part of this Essay (*s*). Sir Matthew Hale, on account of these cases, says: "I will never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found" (*t*). The judicial history of all nations, in all times, abounds with similar warnings and exemplifications of the danger of neglecting these salutary cautions (*u*).

1705, the captain of a vessel and several of his crew were executed on a charge of piracy and murder; but the party supposed to have been murdered reappeared many years afterwards, having been taken at sea and carried into captivity.

(*r*) 2 Hale's P. C. c. 39.

(*s*) See p. 212, *supra*.

(*t*) 2 P. C. ch. 39.

(*u*) See the case of *the two Boorns*, 1 Greenleaf's L. of Ev. § 214, and p. 95, *supra*.

But, nevertheless, to require the discovery of the body in all cases would be unreasonable and lead to absurdity and injustice, and it is indeed frequently rendered impossible by the act of the offender himself. It is said that on the trial for murder of the mother and reputed father of a bastard child, whom they had stripped and thrown into the dock of a seaport town, after which it was never seen again, Mr. Justice Gould advised an acquittal on the ground that as the tide of the sea flowed and reflowed into and out of the dock it might possibly have carried out the living infant (*x*). Mr. Justice Story said of the proposition in question that "it certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious offences. In the cases of murder committed on the high seas the body is rarely if ever found, and a more complete encouragement and protection to the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas" (*y*). It is now clearly established that the fact of death may be legally inferred from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt; as where, on the trial of a mariner for the murder of his captain at sea, a

(*x*) *Per* Garrow *arguendo* in *Rex v. Hindmarsh*, 2 Leach, C. C. 571

(*y*) *United States v. Gilbert*, 2 Sumner, 19, quoted in Berrill on Cir. Ev. 679.

witness stated that the prisoner had proposed to kill him, and that, being alarmed in the night by a violent noise, he went upon deck and saw the prisoner throw the captain overboard, and that he was not seen or heard of afterwards and that near the place on the deck where the captain was, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood. It was urged that, as there were many vessels near the place where the transaction was alleged to have occurred, the probability was that the party had been taken up by some of them and was then alive; but the Court, though it admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed (z); but it is not easy to perceive why the natural presumption from these facts should have been thus restricted to a presumption that the party had been killed before he was thrown overboard.

The rule and its qualifications are well exemplified by the case of Elizabeth Ross, who was tried for the murder of Caroline Walsh. The deceased had been repeatedly solicited by the prisoner to live with her and her husband, but had refused. However she at last consented, and went for that purpose to the prisoner's lodgings, in Goodman's Fields, in the evening of the 19th of August 1831, taking with her her bed and an old basket, in which she was accustomed to carry tape and other articles for sale. Not.

withstanding all inquiry, from that evening all traces of the deceased were lost, and when the prisoner was required by Walsh's relatives to account for her disappearance she prevaricated, but finally asserted that she had gone out early in the morning of the next day, and had not returned. Many circumstances confirmed their suspicions that she had been murdered, and in the month of October the prisoner was apprehended, and charged with the murder of the old woman. From the testimony of the prisoner's son, a boy of twelve years of age, it appeared that she had suffocated the deceased on the evening of her arrival, by placing her hands over her mouth, and pressing on her chest ; and he deposed that the following morning he saw the dead body in the cellar of the house, and that in the evening he saw his mother leave the house with something large and heavy in a sack. A medical man deposed that the means described would be sufficient to cause death. It happened most singularly that, on the evening of the day following that of the alleged murder, an old woman was found lying in the street in the immediate neighbourhood, in a completely exhausted condition, and in a most filthy and squalid state. On being questioned she stated that her name was Caroline Welsh, and that she was a native of Ireland. Her hip was found to be fractured, in consequence of which she was conveyed to the London Hospital, where she subsequently died. The prisoner when apprehended insisted that this was the female whom she was accused of having murdered. The resemblance of names and the coincidence of time were very remarkable ; but by the examination of numerous wit-

nesses the following points of difference were established. They were both Irishwomen ; but Caroline Walsh came from Kilkenny ; Caroline Welsh from Waterford. Walsh was eighty-four years of age, tall, of a sallow complexion, grey hair, and had very perfect incisor teeth in both jaws, having lost only a side tooth in the upper and lower jaws from the effect of continual smoking with a tobacco-pipe. Welsh (the woman who died in the hospital) was about sixty years of age, tall, dark like a mulatto, but had no front teeth, and the alveolar cavities corresponding to them had been obliterated for a considerable time. Walsh was healthy, cleanly, and neat in her person, and her feet were perfectly sound ; Welsh was considerably emaciated ; in a dirty and filthy condition ; her hip broken, her feet covered with bunions and excrescences, and the toes overlapped one another. The two women were differently dressed : Walsh was dressed in a black stuff gown, a broken old willow bonnet, and a faded blue shawl with a broad border ; Welsh wore a striped blue cotton gown, a dark or black silk bonnet, and a snuff-coloured shawl with little or no border. Walsh's clothing was proved to have been sold by the prisoner to different persons, and almost every article was produced in court and identified. The clothes of Welsh, on account of their disgusting condition, had been burnt by order of the parish authorities. Both of these women had similar baskets : that of Walsh had no lid or cover, while that found on Welsh had. Lastly, the body of the latter was taken up from the burial-ground of the London Hospital for the purpose of identification, and it was sworn

by two of the granddaughters of Walsh not to be the body of their grandmother. The prisoner was convicted and executed (*a*). The corpse of the murdered woman was most probably sold by the prisoner for the purpose of dissection; and other murders were committed about the same time both in England and Scotland from the same motive (*b*).

(2) It is another necessary step in the establishment of the *corpus delicti* in cases of homicide, that the body, when discovered, be satisfactorily identified as that of the person whose death is the subject of inquiry. Mr. Justice Park stopped the trial of a woman, charged with the murder of her illegitimate child, because the supposed body was nothing but a mass of corruption, so that there were no lineaments of the human face, and it was impossible even to distinguish its sex (*c*). On the trial of a woman for the murder of her brother, a child eight years of age, by poison, the sexton proved the interment on the 29th of June, and the exhumation on the 12th of August following, of a body which he believed to be that of the deceased, from the coffin-plate, and the place from which he had exhumed it, but he had not seen the body in the coffin at the time of interment, and could not recognise it independently of those circumstances, on account of its state of decay. Mr. Baron Maule refused to receive evidence of the contents of the coffin-plate, on the ground that, being

(*a*) *Rex v. Ross*, O. B. Sess. Pap. 1831.

(*b*) See *Rex v. Burke*, Alison's Principles of the Criminal Law of Scotland, p. 74; Syme's Justiciary Rep. 345. *Rex v. Bishop and others*, O. B. Sess. Pap. 1832.

(*c*) See his charge to the grand jury in *Rex v. Thurtell*, Hertford winter assizes, 1824.

removable, it ought to have been produced, and there being no other evidence of identity stopped the case (*d*). On the trial of a girl for the murder of her illegitimate child, it appeared that she was proceeding from Bristol to Llandogo, and was seen near Tintern at six o'clock in the evening, with the child in her arms, and that she arrived at Llandogo between eight and nine without it, and that the body of a child was afterwards found in the river Wye near Tintern, but which appeared from circumstances not to be the prisoner's child; Lord Abinger held that the prisoner could not be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead; the jury were not sitting, he said, to inquire what the prisoner had done with her child, which might be then alive and well (*e*). In a similar case, Mr. Baron Bramwell observed that the evidence of identity was not complete; that still, if the jury thought there was reasonable evidence upon the point, they might think that if the child was still alive the prisoner would probably produce it in a case where her life was at stake, but that she was at liberty to act upon the defect of proof, and to say that the prosecutor had failed to prove the identity (*f*).

But, nevertheless, it is not necessary that the remains should be identified by direct and positive evidence, where such proof is impracticable, and

(*d*) *Reg. v. Edge*, p. 260, *supra*; and see *Reg. v. Hinley*, 1 Cox, C. C. at p. 13.

(*e*) *Reg. v. Hopkins*, 8 C. & P. 591.

(*f*) *Reg. v. Rudge*, Hereford Summer Assizes, 1857.

especially if it has been rendered so by the act of the party accused. A man was convicted of the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning; the effluvium and other circumstances alarmed the neighbours, and a portion of the body remained unconsumed, sufficient to prove that it was that of a male adult; and various articles which had belonged to the deceased were found on the person of the prisoner, who was apprehended putting off from the Black Rock at Liverpool, after having ineffectually endeavoured to elude justice by drowning himself (*g*). The remains of a man which had lain undiscovered upwards of twenty-three years were identified by his widow from peculiarities in the teeth and skull, and from a carpenter's rule found with them (*h*). The identification of human remains has been facilitated by the preservation of the head and other parts in spirits (*i*); by the antiputrescent action of the substances used to destroy life; by the similarity of the undigested remains of food found in the stomach, with the food which it has been known that the party has eaten (*k*); by means of clothing or other articles of the deceased traced to the possession of the prisoner, and unexplained by any evidence that he became innocently possessed

(*g*) *Rex v. Cook*, Leicester Summer Assizes, 1834; and see *Reg. v. Good*, C. C. C. Sess. Pap., May 1842.

(*h*) *Rex v. Clewes*, Worcester Spring Assizes, 1830, *coram* Littledale, J.

(*i*) *Rex v. Hayes and others*, Paris and Fonblanque's Medical Jurisprudence, vol. iii. p. 73.

(*k*) *Rex v. MacDougal*, Burnett's Criminal Law of Scotland, p. 540.

of them (*l*) ; by means of artificial teeth (*m*), and by numerous other mechanical coincidences.

(3) In the proof of criminal homicide the true cause of death must be clearly established ; and the possibility of accounting for the event by self-inflicted violence, accident or natural cause, excluded ; and only when it has been proved that no other hypothesis will explain all the conditions of the case can it be safely and justly concluded that it has been caused by intentional injury. But, in accordance with the principles which govern the proof of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and positive evidence ; it is sufficient if it be proved by circumstantial evidence, which produces a moral conviction in the minds of the jury, equivalent to that which is the result of positive and direct evidence (*n*).

Suicide, accident, and natural causes are frequently suggested and plausibly urged, as the causes of death, where the allegation cannot receive direct contradiction, and where the truth can be ascertained only by a comparison of all the attendant circumstances ; some of which, if the defence be false, are commonly found to be irreconcilable with the cause alleged.

(*l*) *Rex v. Ross*, p. 285, *supra* ; *Reg. v. Good*, C. C. C. Sess. Pap., May 1842.

(*m*) *Reg. v. Manning and wife*, p. 265, *supra* ; and *Professor Webster's case*, p. 109, *supra*.

(*n*) See the language of Lord Meadowbank in *Reg. v. Humphreys*, Swinton's Report, 315 ; see pp. 198-201, *supra*.

A man named Corder was charged with the murder of a young woman whom he had seduced and who had borne him a child. He took her from her father's house under the pretence of conveying her to Ipswich to be married. Believing that, as he had told her, the parish officers meant to apprehend her, she left her house on the 18th of May in disguise, a bag containing her own clothes having been taken by the prisoner to a barn belonging to his mother, where it was agreed that she should change her dress. The deceased was never heard of afterwards; and the various and contradictory accounts given of her by the prisoner having excited suspicions, which were confirmed by other circumstances, it was ultimately determined to search the barn; where, on the 19th of April, after an interval of nearly twelve months, the body of a female was found, which was clearly identified as that of the deceased. A handkerchief was drawn tightly round the neck, and a wound from a pistol-ball was traced through the left cheek, passing out at the right orbit; and three other wounds were found, all of which had been made by a sharp instrument, and one of which had entered the heart. The prisoner, who in the interval had removed from the neighbourhood, upon his apprehension denied all knowledge of the deceased; but in his defence he admitted the identity of the remains, and alleged that an altercation took place between them at the barn, in consequence of which, and of the violence of temper exhibited by the deceased, he expressed his determination not to marry her, and left the barn; but that immediately afterwards he heard the report of

a pistol, and going back found the deceased on the ground apparently dead ; and that, alarmed by the situation in which he found himself, he formed the determination of burying the corpse and accounting for her absence as well as he could. But the variety of the means and instruments employed to produce death, some of them unusual with females, in connection with the contradictory statements made by the prisoner to account for the absence of the deceased, entirely discredited the account set up by him, and he was convicted. He afterwards made a full confession, and was executed pursuant to his sentence (*o*).

In 1884 a woman was tried before Mr. Justice Hawkins for the murder of her husband by shooting him. The defence was suicide. The medical evidence showed that death was caused by four bullet wounds from a revolver ; that, although any one of them might have been self-inflicted, it was highly improbable that all four were ; and that, in order to cause one of the wounds upon himself, the deceased man must have held the revolver in his left hand. It was also proved that he was right-handed. The prisoner was convicted (*p*).

But these heads of evidence belong rather to the department of medical jurisprudence. Such auxiliary evidence is frequently of the highest value in demonstrating the falsehood and impossibility of the alleged defence ; but, when uncorroborated by

(*o*) *Rex v. Corder*, Bury St. Edmund's Summ. Assizes, 1828.

(*p*) *Rex v. Gibbons*, C. C. C. Sess. Pap., December 18 & 19, 1884.

conclusive moral circumstances, it must be received with a certain amount of circumspection and reserve, of the necessity for which some striking illustrations have occurred in other parts of this essay (*q*). These preliminary considerations naturally lead to the application of them to the proof of the *corpus delicti* in some special cases of great importance and interest.

## SECTION 4.

### APPLICATION OF THE GENERAL PRINCIPLE TO THE PROOF OF THE CORPUS DELICTI IN CASES OF POISONING.

THERE are two classes of cases of criminal homicide, in which the cause of death can rarely be proved by direct evidence, and in which the proof of it by circumstantial evidence is attended with peculiar difficulties: those, namely, of poisoning and infanticide. An examination of the principles on which courts of law proceed in the investigation of such cases will afford an instructive commentary upon the foregoing principles of evidence and procedure.

1. Among the most important grounds upon which the proof of criminal poisoning commonly rests are, the symptoms during life, and *post-mortem* appearances; but these subjects belong to another department of science, and have only an incidental connection with the subject of this treatise. As is the case with regard to all other questions of science,

(*q*) See particularly, *Rex v. Booth*, pp. 146-148, *supra*; and *Reg. v. Newton*, pp. 148-154, *supra*.

courts of justice must derive their knowledge from the testimony of persons who have made them the objects of their special study, applying to the *data* thus obtained those principles of interpretation and judgment which constitute the tests of truth in all other cases.

It is obviously essential that the particular symptoms and *post-mortem* appearances should be shown to be not incompatible with the hypothesis of death from poison. In general such appearances are inconclusive, since, though they are commonly characteristic of death from poison, they not unfrequently resemble the appearance of disease, and may have been produced by some natural cause. Nevertheless, as to some particular poisons, the symptoms may be so characteristic as to afford unmistakable evidence of poisoning, and preclude all possibility of referring the event of death to any other cause. Thus in Palmer's case (*r*), it was conclusively shown by numerous witnesses of the greatest professional experience, that the symptoms in the course of their progress were clearly distinguishable from those of tetanus or any other known form of disease, and were not only consistent with, but specially characteristic of, poisoning by strychnine.

It is a very important circumstance in corroboration of the reality of alleged poisoning, if several persons are simultaneously affected with symptoms indicative of poisoning, after partaking of the same food, as when four members of a family were taken

(*r*) See pp. 344-351, *infra*.

ill after having eaten of yeast dumplings made by the prisoner, who was the cook, while those members who had not partaken of them were not affected (*s*).

The probability in such cases is greatly strengthened if the violence of the symptoms has been in proportion to the quantities of the suspected food taken by the parties (*t*); and, on the other hand, a favourable presumption is created, if only one member of a family is taken ill after partaking of food of which other members have eaten with impunity (*u*). From the nature of the case, these elements of proof never occur alone; but are necessarily blended with facts of a more conclusive character.

2. The possession of poisonous matter by the person charged with the administration of it, is always an important fact, and when death has been caused by poison of the same kind, and no satisfactory explanation of that fact is given by the accused or suggested by the surrounding circumstances, a strong inference of guilt may be created against the accused; especially if he has attempted to account for such possession by false statements. In Palmer's

(*s*) *Rex v. Fenning*, *coram* the Recorder of London, O. B. Sess. Pap., 1815. Cf. p. 218, *supra*. The evidence against this young girl was most unsatisfactory, and she was long thought to have been unjustly convicted (3 Mem. of Romilly, 235; Suggestions for the Repression of Crime, by M. D. Hill, 31); but it has been stated on good authority that she made a confession to a minister of religion, who had her confidence (see "The Times" of Aug. 5, 1857). It is unaccountable that the statement should have been withheld, and the public suffered to remain for nearly half a century under the belief that she was wrongfully executed.

(*t*) *Rex v. Alcorn*, Syme's Justiciary Rep. 221.

(*u*) *Rex v. Bickle*, Exeter Summ. Ass. 1834, *coram* Patteson, J.

case, the Lord Chief Justice Lord Campbell said that if the jury should come to the conclusion that the symptoms which the deceased had exhibited were consistent with strychnia, a fearful case was made out against the prisoner. "I have listened," said the learned judge, "with the most anxious attention to know what explanation would be given respecting the strychnia that has been purchased by the prisoner. There is no evidence of the intention with which it was purchased, there is no evidence how it was applied, what became of it, or what was done with it" (*x*).

3. Not only must it appear that the accused possessed the deadly agent, but it is indispensable to show that he had the *opportunity* of administering it. Upon the effect of these heads of evidence, and upon the caution with which they ought to be received, some valuable observations were made by Mr. Baron Rolfe in a case before him. The prisoner was indicted for the murder of his wife, who was taken ill on the morning of the 25th of November, and died two days afterwards with symptoms resembling those of an irritant poison. Poisoning not having been suspected, the body was interred without examination; but suspicions having afterwards arisen, it was exhumed in the month of June following, and a large quantity of arsenic was discovered in the stomach. Several weeks after the apprehension of the prisoner, the police took possession of some of his garments, which were found hanging up in his lodgings, in the pockets of

(*x*) See pp. 344-351, *infra*.

which arsenic was found. In his address to the jury, Mr. Baron Rolfe said, "Had the prisoner the opportunity of administering poison?—that is one thing. Had he any motive to do so?—that is another. There is also another question, which is most important; it is whether the person who had the opportunity of administering poison had poison to administer? If he had not the poison, the having the opportunity becomes unimportant. If he had the poison, then another question arises—did he get it under circumstances such as to show that it was for a guilty or improper object? The evidence by which it is attempted to trace poison to the possession of the prisoner is, that on a certain occasion, after the death of his wife, and after he himself was apprehended, the contents of the pockets of a coat, waistcoat, and trousers, on being tested by the medical witnesses, were found to contain arsenic; and that, a week afterwards, another waistcoat which came into the possession of the policeman, on being examined, was also found to contain arsenic. Does that bring home to the prisoner the fact that he had arsenic in his possession in November? It is not conclusive that, because he had it in June, he had it in November. I infer from what has been stated by the medical men, that the quantity of arsenic found in the pockets of the clothes was very small. Now, if he had it in a larger quantity in November, and it had been used for some purpose, being a mineral substance, such particles were likely to remain in the pockets, and finding it there in June is certainly evidence that it might have been there in larger

quantity in November ; but, obviously, by no means conclusive, as it might have been put in afterwards. But, connected with the arsenic being found in the clothes, there are other considerations which are worthy to be attended to. The prisoner was apprehended on the 9th of June, and he knew long before that time that an inquiry was going on. He was taken up, not in the clothes in which the arsenic was found ; and a fortnight afterwards a batch of clothes was given up in which arsenic was detected. Now, if arsenic had been found in the clothes he was wearing, it would be perfectly certain, in the ordinary sense, that he had arsenic in his possession. But it is going a step further to say that because arsenic is discovered in clothes of his, accessible to so many people between the time of his apprehension and their being given up, it was there when he was apprehended ; in all probability it was, but that is by no means the necessary consequence. This observation is entitled to still more weight, with regard to the waistcoat last given up to the police, because it was not given up till three weeks after the prisoner was apprehended, and had been hanging in the kitchen, accessible to a variety of persons. . . . It is urged also that arsenic is used for cattle. It may be so, and it may be that the prisoner may innocently have had arsenic. The circumstance of there being arsenic in so many pockets ought not to be lost sight of, for it can scarcely be conceived that a guilty person should be so utterly reckless as to put the poison he used into every pocket he had. One would have thought that he would have kept it concealed, or put it only

in some safe place for the immediate purpose of being used ; and it is worthy of observation that it does not appear to have been put into the clothes in such a way as it would have been put had the prisoner been desirous to conceal it." The prisoner was acquitted (y).

In a later case of the deepest interest, before the High Court of Justiciary at Edinburgh, a question whether or not the prisoner had the opportunity of administering arsenic to the deceased was the turning-point of the case. The prisoner, a young girl of nineteen, was tried upon an indictment charging her, in accordance with the law of Scotland, with the administration to the same person of arsenic, with intent to murder, on two several occasions in the month of February, and with his murder by the same means on the 22nd of March following. She had returned home from a boarding school in 1853, and in the following year formed a clandestine connection with a foreigner of inferior position, named L'Angelier, whose addresses had been forbidden by her parents. Early in 1856 their intercourse assumed an unlawful character, as was shown by her letters. In the month of December following, another suitor appeared, whose addresses were accepted by her with the consent of her parents, and arrangements were made for their marriage in June. During the earlier part of this engagement, the prisoner kept up her interviews and correspondence with L'Angelier ; but the correspondence gradually became cooler, and she

(y) *Reg. v. Graham*, Carlisle Summer Assizes, 1845.

expressed to him her determination to break off the connection, and implored him to return her letters ; but this he refused to do, and declared that she should marry no other person while he lived. After the failure of her efforts to obtain the return of her letters, she resumed in her correspondence her former tone of passionate affection, assuring him that she would marry him and no one else, and denying that there was any truth in the rumours of her connection with another. She appointed a meeting on the night of the 19th of February, at her father's house, where she was in the habit of receiving his visits, after the family had retired to rest, telling him that she wished to have back her "cool letters," apparently with the intention of inducing him to believe that she remained constant in her attachment to him. In the middle of the night after that interview, at which he had taken coffee prepared by the prisoner, L'Angelier was seized with alarming illness, the symptoms of which were similar to those of poisoning by arsenic. There was no evidence that the prisoner possessed arsenic at that time, but on the 21st she purchased a large quantity, professedly for the purpose of poisoning rats, an excuse for which there was no pretence. On the night of the 22nd, L'Angelier again visited the prisoner, and about eleven o'clock on the following day was seized with the same alarming symptoms as before ; and on this occasion also he had taken cocoa from the hands of the prisoner. After this attack L'Angelier continued extremely ill, and was advised to go from home for the recovery of his health.

On the 6th of March the prisoner a second time

bought arsenic ; and on the same day she went with her family to the Bridge of Allan (where she was visited by her accepted lover), and remained till the 17th, when they returned to Glasgow. On the day before her departure for the Bridge of Allan L'Angelier wrote a letter to her, in which he reproached her for the manner in which she had evaded answering the questions which he had put to her in a former letter respecting her rumoured engagement with another person, expressed his conviction that there was foundation for the report, and after repeating his inquiries threatened, if she again evaded them, to try some other means of coming at the truth. To this letter, the prisoner replied from the Bridge of Allan, that there was no foundation for the report, and that she would answer all his questions when they met, and informed him of her expected return to Glasgow on the 17th of March. L'Angelier, pursuant to medical advice, on the 10th of March went to Edinburgh, leaving directions for the transmission of his letters, and having become much better, left that place on the 19th for the Bridge of Allan. During this interval, namely, on the 17th, he returned to his lodgings at Glasgow, and inquired anxiously of his landlady if there was no letter waiting for him, as the prisoner's family were to be at home on that day, and she was to write to fix another interview. He left Glasgow again on Thursday the 19th for the Bridge of Allan, leaving directions as before for the transmission to him of any letter which might come for him during his absence.

On the 18th of March, the prisoner a third time purchased a large quantity of arsenic, alleging,

as before, that it was for the purpose of killing rats. A letter from the prisoner to L'Angelier came to his lodgings on Saturday the 21st, from the date and contents of which it appeared that she had written a letter appointing to see him on the 19th ; he had not, however, received it in time to enable him to keep her appointment. In that letter she urged him to come to see her, and added, " I waited and waited for you, but you came not. I shall wait again to-morrow night, same time and arrangement." This letter was immediately transmitted to L'Angelier, and in consequence he returned to his lodgings at Glasgow about eight o'clock on the evening of Sunday the 22nd, in high spirits and improved health, having travelled a considerable distance by railway, and walked fifteen miles. He left his lodgings about nine o'clock, and was seen going leisurely in the direction of the prisoner's house, and about twenty minutes past nine he called at the house of an acquaintance who lived about four or five minutes' walk from the prisoner's residence. After leaving his friend's house, all trace of him was lost, until two o'clock in the morning, when he was found at the door of his lodgings, unable to open the latch, doubled up and speechless from pain and exhaustion, and about eleven o'clock the same morning he died, from the effects of arsenic, of which an enormous quantity was found in his body.

The prisoner stated in her declaration that she had been in the habit of using arsenic as a cosmetic, and denied that she had seen the deceased on that eventful night ; whether she had done so or not was the all-momentous question. As there was

no evidence that the prisoner possessed poison at the time of the first illness, nor any analysis made of the matter ejected on either the first or second illness, the learned Lord Justice Clerk said that there was no proof of the administration of poison on either of those occasions ; that the first charge therefore had entirely failed, and that it was safer not to hold that the second illness was caused by poison.

As to the principal charge of murder, his Lordship said, " Supposing you are quite satisfied that the prisoner's letter brought L'Angelier again into Glasgow, are you in a situation to say, with satisfaction to your consciences, as an inevitable and just result from this, that the prisoner and deceased met that night?—that is the point in the case. It is for you to say whether it has been proved that L'Angelier was in the house that night. Can you hold that that link in the chain is supplied by just and satisfactory inference—remember that I say just and satisfactory—and it is for you to say whether the inference is satisfactory and just, in order to complete the proof? If you really feel that you may have the strongest suspicion that he saw her—and no one need hesitate to say that, as a matter of moral opinion, the whole probabilities of the case are in favour of it—but if that is all the amount that you can derive from the evidence, the link still remains wanting in the chain, the catastrophe and the alleged cause of it are not found linked together. And therefore you must be satisfied that you can here stand and rely upon the firm foundation, I say, of a just and sound, and perhaps

I may add, inevitable inference. That a jury is entitled often to draw such an inference there is no doubt. . . . If you find this to be a satisfactory and just inference, I cannot tell you that you are not at liberty to act upon it, because most of the matters occurring in life must depend upon circumstantial evidence, and upon the inferences which a jury may feel bound to draw. But it is an inference of a very serious character—it is an inference upon which the death of this party by the hand of the prisoner really must depend. And then, you will take all the other circumstances of the case into your consideration, and see whether you can infer from them that they met. If you think they met together that night, and he was seized and taken ill, and died of arsenic, the symptoms beginning shortly after the time he left her, it will be for you to say whether in that case there is any doubt as to whose hand administered the poison.”

In another part of his charge the learned Judge said :—“ In the ordinary matters of life, when you find the man came to town for the purpose of getting a meeting, you may come to the conclusion that the meeting did take place ; but, observe, that becomes a very serious inference indeed to draw in a case where you are led to suppose that there was an administration of poison, and death resulting therefrom. It may be a very natural inference, looking at the thing morally. None of you can doubt that she waited for him again ; and if she waited the second night, after her first letter, it was not surprising that she should look out for an interview on the second night, after the second letter. . . . She says, ‘ I

shall wait again to-morrow night, same hour and arrangement.' And I say there is no doubt—but it is a matter for you to consider—that after writing this letter he might expect she would wait another night, and therefore it was very natural that he should go to see her that Sunday night.

"But this is an inference only. If you think it such a just and satisfactory inference that you can rest your verdict upon it, it is quite competent for you to draw such an inference from such letters as these, and from the conduct of the man coming to Glasgow for the purpose of seeing her—for it is plain that that was his object in coming to Glasgow. It is sufficiently proved that he went out immediately after he got some tea and toast, and had changed his coat. But then, in drawing an inference, you must always look to the important character of the inference which you are asked to draw. If this had been an appointment about business, and you found that a man came to Glasgow for the purpose of seeing another upon business, and that he went out for that purpose, having no other object in coming to Glasgow, you would probably scout the notion of the person whom he had gone to meet saying, 'I never saw or heard of him that day'; but here you are asked to draw the inference that they met upon that night, where the fact of their meeting is the foundation of a charge of murder. You must feel, therefore, that the drawing of an inference in the ordinary matters of civil business, or in the actual intercourse of mutual friends, is one thing, and the inference from the fact that he came to Glasgow, that they did meet, and that,

therefore, the poison was administered to him by her at that time, is another, and a most enormous jump in the category of inferences. Now, the question for you to put to yourselves is this—Can you now, with satisfaction to your own minds, come to the conclusion that they did meet on that occasion, the result being, and the object of coming to that conclusion being, to fix upon her the administration of the arsenic by which he died?

“She has arsenic before the 22nd; and that is a dreadful fact, if you are quite satisfied that she did not get it and use it for the purpose of washing her hands and face. It may create the greatest reluctance in your minds to take any other view of the matter, than that she was guilty of administering it somehow, though the place where may not be made out, or the precise time of the interview. But, on the other hand, you must keep in view that arsenic could only be administered by her if an interview took place with L’Angelier; and, though you may be satisfied *morally* that it did take place, the fact still rests upon an inference alone; and that inference is to be the ground, and must be the ground, on which a verdict of guilty is to rest. You will see, therefore, the necessity of great caution and jealousy in dealing with any inference which you may draw from these facts. You may be perfectly satisfied that L’Angelier did not commit suicide; and of course it is necessary for you to be satisfied of that before you could find that anybody administered arsenic to him. Probably none of you will think for a moment that he went out that night and that, without seeing her, and without knowing what she

wanted to see him about, he swallowed above 200 grains of arsenic in the street, and that he was carrying it about with him. Probably you will discard such an idea altogether, . . . yet, on the other hand, keep in view that that will not of itself establish that the prisoner administered the poison. The matter may remain most mysterious—wholly unexplained; you may not be able to account for it on any other supposition; but still that supposition or inference may not be a ground on which you can safely and satisfactorily rest your verdict against the panel.

“Now then, gentlemen, I leave you to consider the case with reference to the views that are raised upon this correspondence. I don't think you will consider it so unlikely as was supposed, that this girl, after writing such letters, may have been capable of cherishing such a purpose. But still, although you may take such a view of her character, it is but a supposition that she cherished this murderous purpose—the last conclusion of course that you ought to come to merely on supposition and inference and observation, upon this varying and wavering correspondence, of a girl in the circumstances in which she was placed. It receives more importance, no doubt, when you find the purchase of arsenic just before she expected, or just at the time she expected, L'Angelier. But still these are but suppositions; they are but suspicions. .

I don't say that inferences may not competently be drawn; but I have already warned you as to inferences which may be drawn in the ordinary matters of civil life, and those which may be drawn

in such a case as this ; and therefore if you cannot say, We find here satisfactory evidence of this meeting, and that the poison must have been administered by her at a meeting—whatever may be your suspicion, however heavy the weight and load of suspicion is against her, and however you may have to struggle to get rid of it, you perform the best and bounden duty as a jury to separate suspicion from truth, and to proceed upon nothing that you do not find established in evidence against her.”

The jury returned, in conformity with the law of Scotland, a verdict of not guilty on the first, and of not proven on the second and third charges (z). On the supposition that the parties met on the fatal evening in question, there could be but one conclusion as to the guilt of the prisoner, the hypothesis of suicide being considered by the learned Judge as out of the question, as it obviously was ; and in the language of the learned Judge, “that this man, ardent to see this girl again, hoping to get the satisfactory answer which she had promised to give him respecting her rumoured engagement with another, should hurry home on the Sunday night, and go out from his lodgings in the hope that he could find her waiting, and that there was the greatest probability of his seeing her, was, he thought, the only conclusion the jury could come to in the matter.” Without presumption, it may be observed that the distinction thus drawn between “a very natural inference, looking at the thing morally,” “an inference that may satisfy a jury

(z) *Reg. v. Madeleine Smith*, June, 1857 ; Reports of A. F. Irvine, Advocate, and John Morrison, Advocate.

morally," so that "no one need hesitate to say as a matter of moral opinion, the whole probabilities of the case are in favour of it," and "as the only conclusion the jury could come to," and that moral certainty which is the only foundation of our confidence in the sufficiency and safety of conclusions based upon circumstantial evidence, and which in every case can be but inferential, is fine and shadowy in the extreme. Nor is it easy to reconcile with sound principle, as recognised in other cases, English and Scotch, any distinction in the application of the rules of evidence and inference according as the subject-matter relates to the ordinary or the uncommon events of life (*a*). And even upon that supposition, surely no matter or occasion of ordinary business could have been more important to her, or have more deeply interested the parties, or be more likely to bring two young persons so mutually implicated together, than the object of the anxiously looked-for meeting appointed for the night in question. It seems, indeed, difficult to conceive a more unsatisfactory treatment of the case from any logical or philosophical point of view.

4. The science of chemistry generally affords most important auxiliary evidence as to the *corpus delicti* in the investigation of cases of imputed poisoning. As with regard to scientific evidence of every other kind, the processes and results of chemical analysis in application to the discovery or reproduction of poison are subordinated to the control of those general principles of law which, in

(*a*) See *Rex v. Ings*, and *Reg. v. Hanson and others*, p. 270, *supra*.

all other cases, govern the admissibility of evidence, and the estimation of its weight and effect : indeed, those rules have received some of their most instructive illustrations from cases of this nature.

Of the various chemical tests, unquestionably those which, applied to the human body or its contents or *excreta*, reproduce the particular poison which has been employed, are the most satisfactory, since, if the re-agents employed are free from impurities, they give an infallible result.

A remarkable exemplification of the necessity of this qualification occurred in a trial in which Reinsch's test, which had previously been regarded as infallible in the separation of arsenic, turned out to be fallacious when applied to potassium chlorate ; and, in fact, the arsenic which was found in the mixture had been liberated from the copper gauze employed in the experiment (*b*).

In general, therefore, it may be considered as a sound rule of procedure, founded in justice and prudence, that such evidence, whenever it is capable of being obtained, ought to be adduced, and in such circumstances the failure to adduce such evidence, unexplained by satisfactory reasons, gives serious ground for doubt as to the reality of the alleged poisoning.

But some of the vegetable poisons are, in the

(*b*) *Reg. v. Smethurst*, C. C. C. Sess. Pap., Aug. 1859, see p. 138, *supra*. But arsenic was also found in an evacuation not complicated with the same source of fallacy.

present state of science, beyond the reach of chemical processes, and, under certain conditions, also beyond the reach of physiological methods (*c*). The offender himself, by his chemical knowledge and choice of means, by the administration of minimum doses, or by the destruction of the portions of the body containing the suspected matter, or by the destruction, dilution, or other tampering with its *excreta* or contents, may have rendered detection by the reproduction of the deadly agent impracticable; or the absorption of the poison, or a want of skill in the experimenter, or failure to employ the proper means, or other cause may have rendered the necessary chemical researches impracticable, unsatisfactory or inconclusive (*d*). The concurrence, moreover, of a plurality of characteristic tests, separately fallacious, but fallacious from different causes, may, in connection with strong moral facts, yield a result of so high a degree of probability as

(*c*) The Editor is indebted to Dr. Dupré, F.R.S., for the following note :—

“As regards chemical processes the case can be stated definitely, since, in the case of some vegetable poisons, even under the most favourable conditions, chemical methods alone would not enable us to determine, with any certainty, the particular poison present.

“With regard to physiological methods the case is somewhat different. Under favourable conditions, *i.e.* a relatively large dose of poison administered, speedy death of the person poisoned, and the examination begun soon after death, there is, probably, no vegetable poison which could not then be identified by physiological tests, aided by chemical processes. When, however, the amount of poison given is small, only just sufficient to cause death, when the person has survived for some time after the administration of the poison, and, lastly, the examination is begun some length of time after death, even physiological methods might, and probably would, fail to identify the poison.”

(*d*) *Rex v. Donellan*, pp. 324–331, *infra*; *Reg. v. Smethurst* (see last page); *Reg. v. Palmer*, pp. 344–351, *infra*.

to be perfectly convincing, though the poison has not been reproduced (*e*).

It would be most unreasonable, therefore, and lead to the grossest injustice, and in some circumstances to impunity for the worst of crimes, to require, as an imperative rule of law, that the fact of poisoning shall be established by any special and exclusive medium of proof, when that kind of proof is unattainable, and especially if it has been rendered so by the act of the offender himself. No universal and invariable rule, therefore, can be laid down; and every case must depend upon its own particular circumstances; and as, in all other cases, the *corpus delicti* must be proved by the best evidence which is capable of being adduced, and by such an amount and combination of relevant facts, whether direct or circumstantial, as establish the *factum probandum* to a moral certainty, and to the exclusion of every other reasonable hypothesis.

Tawell's case, which has been referred to more than once in these pages, is a useful illustration of the kind of evidence necessary to prove the *corpus delicti*, and contains an exhaustive summing-up of Mr. Baron Parke as to the duties of a jury in cases of this kind. The prisoner was tried at the Aylesbury Spring Assizes, 1845, for the murder of Sarah Hart by poisoning her with prussic acid. The deceased woman entered the prisoner's service shortly before the death of his first wife, and when

(*e*) *Rex v. Elder*, Syme's Justiciary Rep. 71, at p. 108; and see *Rex v. Donnell*, pp. 331-336, *infra*.

she left his service was pregnant by him, and eventually bore him two children. At the time of the murder she was residing in a small cottage at Slough, and was receiving £13 a quarter from the prisoner, which was her only means of support. The prisoner had married a second wife, and was living in apparent comfort and respectability at Berkhamstead, though his account with his bankers was overdrawn. On the 1st of January, Sarah Hart's next-door neighbour, hearing screams, came out of her cottage, walked down the garden path, and went to the garden gate of the deceased woman's cottage, where she met the prisoner coming out of the gate, evidently agitated and in haste. It being dark, she was carrying a candle, and looked at the prisoner and passed a remark to him ; and at the trial swore to his identity. He hurried on towards Slough, and she went into the cottage where she found the deceased woman on the floor moaning ; by the time a doctor was fetched she was dead. It was proved that shortly before this the woman was quite well, and had fetched a bottle of porter from a neighbouring house, and had borrowed a corkscrew. The bottle was in the room open, and two tumblers had been used. It was proved that on a previous occasion, when she had taken porter with the prisoner, she was taken suddenly ill. The woman's stomach was taken to London, and after tests for oxalic acid and other poisons had been applied, prussic acid was found, and the medical witnesses came to the conclusion that she had died of prussic acid poisoning. At that time it was not known that the prisoner was in

the habit of buying prussic acid ; but it was proved on the trial that on the day of the murder he had bought two drachms of Scheele's prussic acid in Bishopsgate Street, bringing his own bottle to be filled, but taking it away in another bottle ; also that on the following day he had none, for he went back to the shop and said he had lost it, and had the bottle which he had left the previous day filled. When arrested he declared that he had not been to Slough.

The defence was largely based on the fact that the prisoner bought prussic acid for external application for varicose veins—which appeared to be true, so far as it went—that there was no proof that the woman died from the effects of prussic acid, and that its presence was due to the pips of apples which she had eaten. But it was proved by the medical men that prussic acid could not be obtained from food by natural digestion, but only by distillation, and, as the learned judge pointed out to the jury, the peculiar smell of prussic acid was noticed in the stomach before it could have been set free by distillation. It was strenuously urged by the counsel for the prisoner that it was a rule of law that there ought to be positive proof of the *mode* of death, and that such a quantity of poison must be found in the body of the deceased as would necessarily occasion death. But this doctrine was peremptorily repudiated by Mr. Baron Parke, who told the jury : “ If the evidence satisfies you that the death was occasioned by poison, and that that poison was administered by the prisoner—if that is proved by circumstantial evidence, it is not necessary to

give direct and positive proof of what is the quantity which would destroy life, nor is it necessary to prove that such a quantity was found in the body of the deceased, if the other facts lead you to the conclusion that the death was occasioned by poison, and that it was knowingly administered by the prisoner. You must take this fact, just the same as all the other parts of the case, and see if you are satisfied, as reasonable men, whether the prisoner is guilty or not. The only fact which the law requires to be proved by direct and positive evidence is the death of the party, by finding the body; or when such proof is absolutely impossible, by circumstantial evidence leading closely to that result—as where a body was thrown overboard far from land—when it is quite enough to prove that fact without producing the body.”

His Lordship, in a subsequent part of his charge, said. “There is very reasonable evidence—supposing that to be required, which I tell you is not—that the quantity of prussic acid in the stomach amounted to one grain; and although that is not necessary to be proved, the scientific evidence shows that one grain may be enough to destroy life.” In reference to the argument urged by the prisoner’s counsel, that the deceased might have died from some sudden emotion, the learned Judge said that it was within the range of possibility that a person might so die without leaving any trace on the brain; *they*, however, were to judge whether they could attribute death to that cause, if they found strong evidence of the presence of poison; because they were not to have recourse

to mere conjecture ; that, where the result of the evidence gave them the existence of a cause to which it might be rationally attributed, they were not to suppose, without any reason for doing so, that it was to be attributed to any other cause (*f*).

Lord Campbell, in Palmer's case, said that it was not to be expected that witnesses should be called to state that they saw the deadly poison administered by the prisoner, or mixed up by the prisoner openly before them. Circumstantial evidence, as to that, continued the learned Judge, is all that can be reasonably expected ; and if there were a series of circumstances leading to the conclusion of guilt, a verdict of guilty might satisfactorily be pronounced (*g*). With respect to the consideration that no strychnia was found in the body, it was for them to consider ; but there was no rule of law according to which the poison must be found in the body of the deceased, and all that they knew respecting the poison not being in the body was, that in that part of the body that was analysed by the witnesses no strychnia had been found (*h*).

5. Of the various heads of evidence in charges of poisoning, that of moral conduct is of most general interest. The *data* of physiological and pathological and chemical science must always be matter of opinion testified to by skilled witnesses ; whereas, in the forensic discussion of moral facts, appeal is necessarily made to those psychological

(*f*) Shorthand Report ; for references see p. 84, *supra*.

(*g*) Official Shorthand Report, 1856, p. 308.

(*h*) *Ib.* pp. 319-396.

principles of our nature which give them pertinence and significance, and upon which intelligent persons are capable of forming a more or less trustworthy judgment. It would be absurd to suppose that such facts, when clearly connected by adequate independent evidence with a *corpus delicti*, are simply fortuitous and phenomenal; on the contrary, they are the natural and unmistakable manifestations of the secret workings of the mind, not only throwing light upon and bringing into relief the character of the act itself, but tending also to discriminate the individual guilty actor. His necessities, his antipathies, or other motives, his reluctance to permit examination of the body, or its contents or *excreta*, or of other suspected matter—his contrivances to prevent it, his attempts to tamper with the witnesses or the officers of justice, or with such suspected matter, or with any other article of real evidence—his falsehoods, subterfuges, and evasions—these and many other circumstances constitute most material explanatory parts of the *res gestæ*, and afford relevant and frequently conclusive evidence, from which his guilt may be inferred.

In most criminal charges, the evidence of the *corpus delicti* is separable from that which applies to the indication of the offender; but in cases of poisoning, it is often impossible to obtain conclusive evidence of the *corpus delicti*, irrespectively of the explanatory evidence of moral conduct; and Mr. Justice Buller, in Donellan's case, told the jury that "if there was a doubt upon the evidence of the physical witnesses, they must take into their considera-

tion all the other circumstances, either to show that there was poison administered, or that there was not, and that every part of the prisoner's conduct was material to be considered" (*i*). So in Donnall's case, Mr. Justice Abbott, in summing up, said to the jury that there were two important questions: first, did the deceased die of poison? and if they should be of opinion that she did, then, whether they were satisfied from the evidence that the poison was administered by the prisoner or by his means? There were some parts of the evidence which appeared to him equally applicable to both questions, and those parts were what related to the conduct of the prisoner during the time of the opening and inspection of the body; his recommendation of a shell and the early burial; to which might be added the circumstances, not much to be relied upon, relative to his endeavours to evade his apprehension. His Lordship also said, as to the question whether the deceased died by poison, "in considering what the medical men have said upon the one side and the other, you must take into account the conduct of the prisoner in urging a hasty funeral, and his conduct in throwing away the contents of the jug into the chamber utensil" (*k*).

The Lord Chief Justice Lord Campbell, in his charge to the jury in Palmer's case, said that "in cases of this sort the evidence had often

(*i*) Gurney's Shorthand Report, p. 53; see p. 37, *supra*. A full account of the case is given at pp. 324-331, *infra*.

(*k*) Frazer's Shorthand Report, pp. 127, 177. See pp. 331-336, *infra* where a full account of this case is given

been divided into medical and moral evidence ; the medical being that of the scientific men, and the moral the circumstantial facts which are calculated to prove the truth of the charge against the party accused. They cannot," he continued, "be finally separated in the minds of the jury, because it is by the combination of the two species of evidence that their verdict ought to be found. In this case you will look at the medical evidence to see whether the deceased, in your opinion, did die by strychnia or by natural disease ; and you will look at what is called the moral evidence, and consider whether that shows that the prisoner not only had the opportunity, but that he actually availed himself of that opportunity, to administer to the deceased the deadly poison of which he died" (1). His Lordship also said "It is impossible that you should not pay attention to the conduct of the prisoner, and there are some instances of his conduct as to which you will say whether they belong to what might be expected from an innocent or a guilty man. He was eager to have the body fastened down in the coffin. Then with regard to the betting-book, there is certainly evidence from which you may infer that he did get possession of the deceased's betting-book, and that he abstracted it and concealed it. Then, you must not omit his conduct in trying to bribe the post-boy to overturn the carriage in which the jar was being conveyed to be analysed in London, and from which evidence might be obtained of his guilt. Again, you find him tampering with the post-master, and procuring from him the opening of a letter, from

(1) *Reg. v. Palmer*, p. 344, *infra*. Shorthand Report, p. 308.

the person who had been examining the contents of the jar to the attorney employed in the case. And then, you have tampering with the coroner, and an attempt to induce him to procure a verdict from the coroner's jury, which would amount to an acquittal. These are serious matters for your consideration, but you, and you alone, will say what inference is to be drawn from them. If not answered, they certainly present a serious case for your consideration" (*m*).

Among the most important circumstances of moral conduct, and in analogy with the rules which prevail in the proof of the *corpus delicti* in other cases, may be mentioned former acts of poisoning, or attempts to poison, whether the same individual, or other members of the same family, where such successive administrations throw light upon the particular act which forms the subject of inquiry. On a trial for murder by the administration of prussic acid in porter, evidence was admitted that the deceased had been taken ill several months before, after partaking of porter with the prisoner (*n*). And upon the trial of a woman for the murder of her husband by arsenic in September, evidence was admitted of arsenic having been taken by two of her sons, one of whom died in December, and the other in March following, and also by a third son, who took arsenic in April following, but did not die. Evidence was also admitted of a similarity of symptoms in the four cases, that the prisoner lived in the same house with her husband and sons, and pre-

(*m*) Shorthand Report p. 320. (*n*) *Reg. v. Tawell*, pp. 313 317, *supra*.

pared their tea, cooked their victuals, and distributed them to the four parties. Lord Chief Baron Pollock said his opinion was that evidence was receivable that the deaths of two sons, and the illness of the third, proceeded from the same cause, namely, arsenic. The tendency of such evidence, he said, was to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In that case he thought it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred, was also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence, he said, was not inadmissible, by reason of its tendency to prove, or to create a suspicion of a subsequent felony. His Lordship, after taking time to consider, refused to reserve the point for the opinion of the Judges, under 11 & 12 Vict. c. 78, and stated that Mr. Baron Alderson and Mr. Justice Talfourd concurred in opinion with him (o).

But, nevertheless, moral facts apparently calculated to create the greatest suspicion may not be really

(o) *Reg. v. Geering*, 18 L. J. M. C. 215; approved in a recent case before the Privy Council: *Makin v. The A. G. for New South Wales*, 1894, App. Cas. 57. Cf. also *Reg. v. Francis*, L.R. 2 C.C. 128, and *Reg. v. Flannagan*, 15 Cox, 403 (murder by arsenical poisoning), and other cases upon this subject cited and discussed in Archbold's Criminal Pleading (22nd ed.), pp. 283-287. See also note to Ch. iii. s. 2, p. 63, *supra*.

of a suspicious nature, or may be too fallacious and uncertain to justify conviction, especially where the *corpus delicti* is matter of inference only, and not established by independent evidence. Justice requires that such facts should be interpreted in a spirit of candour, and with proper allowance for the weaknesses of men who may be suddenly placed in circumstances of suspicion and difficulty. It is well known, for example, that many persons, more especially in the humbler classes, feel great repugnance to permit the bodies of their friends to be subjected to anatomical examination. The manifestation of such repugnance is a fact to be taken into account like all other facts. But although in the case of violent or sudden death, and particularly when caused by poison, it must be known that the *post-mortem* examination is of the highest importance, it by no means follows that objection to permit such examination proceeds from the consciousness of guilt. In a case of this kind, Mr. Baron Rolfe said that the question was, from what motive the reluctance arose? On the one hand, it was suggested that it was because the prisoner did not wish the cause of his wife's death to be investigated, being afraid it would be discovered that she had died from arsenic; on the other, that his reluctance arose from his horror of the notion of his wife's dead body being taken up, and exposed to the investigation of the surgeons, at which the feelings were apt to revolt. Many persons, no doubt, felt very great horror at the notion of such things being done to themselves, or those connected with them; whilst others, again, were indifferent

on the subject, leaving their own bodies to be dissected. But few persons liked to have their wives or their daughters so exposed ; the prisoner, said the learned Judge, might not be one of those few, and his feelings on that subject might have prompted the remark alleged against him ; and surely he must have known that any reluctance expressed by him to an inquiry, or wish to stop it, would only tend to make those, who were about to make it, persevere (*p*).

It happens of necessity that in every case of the kind under discussion there is a concurrence of evidence derived, if not from all, at least from several of the sources which have been mentioned ; so that the strength of the conviction finally produced depends not merely upon the sum of the separate forces, but upon that superior force analogous to a geometrical progression, which is the consequence of their combination.

An analysis of some of the most remarkable recorded cases of criminal poisoning which have occurred in our judicial annals, will form an interesting commentary upon the general rules of evidence, more especially in their application to the interpretation of moral inculpatory facts.

John Donellan, Esq., was tried at Warwick spring assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Boughton, his brother-in-law, a young man of fortune, twenty years of

(*p*) *Reg v. Graham*, pp. 297-300, *supra*.

age, who up to the moment of his death had been in good health and spirits, with the exception of a trifling local ailment, for which he occasionally took a laxative draught. Mrs. Donellan was the sister of the deceased, and together with Lady Boughton his mother lived with him at Lawford Hall, the family mansion. On attaining twenty-one, Sir Theodosius would have been entitled absolutely to an estate of £2,000 per annum, the greater part of which, in the event of his dying under that age, would have descended to the prisoner's wife. For some time before the death of Sir Theodosius, the prisoner had on several occasions falsely represented his health to be very bad, and his life to be precarious, and not worth a year's purchase, though to all appearance he was well and in good health. On the 29th of August the apothecary in attendance sent him a mild and harmless draught, to be taken the next morning. In the evening the deceased was out fishing, and the prisoner told Lady Boughton that he had been out with him, and that he had imprudently got his feet wet, both of which statements were false.

When called the following morning he was in good health; and about seven o'clock his mother went to his chamber for the purpose of giving him his draught, which was kept—at the prisoner's suggestion, made after Sir Theodosius had on one occasion complained of forgetting to take it—upon the open shelf of his outer room, instead of locked up in his closet as formerly. On taking the draught on this occasion he observed that it smelt

and tasted very nauseous, and Lady Boughton remarked that she thought it smelt very strongly like bitter almonds. In about two minutes he struggled very much, as if to keep the medicine down, and Lady Boughton observed a gurgling in his stomach ; in ten minutes he seemed inclined to doze, but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the draught he died. Lady Boughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant ; and in less than five minutes the prisoner came into the bedroom, and after she had given him an account of the manner in which Sir Theodosius had been taken, he asked where the physic-bottle was, and she showed him the two bottles. The prisoner then took up one of them and said, " Is this it ? " and being answered " Yes," he poured some water out of the water-bottle, which was near, into the phial, shook it, and then emptied it into some dirty water, which was in a washhand basin. Lady Boughton said, " You should not meddle with the bottle " ; upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger to it and tasted it. Lady Boughton again asked what he was about, and said he ought not to meddle with the bottles ; on which he replied, he did it to taste it, though he had not tasted the first bottle. The prisoner ordered a servant to take away the basin, the dirty things, and the bottles, and put the bottles into her hands for that purpose ; she put them down again,

on being directed by Lady Boughton to do so, but subsequently, while Lady Boughton's back was turned, removed them on the peremptory order of the prisoner.

On the arrival of the apothecary the prisoner said the deceased had been out the preceding evening fishing, and had taken cold; but he said nothing of the draught which he had taken. The prisoner had a still in his own room, which he had used for distilling roses, and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned. The prisoner made several false and inconsistent statements to the servants and others as to the cause of the young man's death, attributing it at one time to his having been out late fishing, and getting his feet wet, and at another to the bursting of a blood-vessel, and again to the malady for which he was under treatment, and the medicine given to him. On the day of his death he wrote to Sir William Wheeler, Sir Theodosius's guardian, to inform him of the event, but made no reference to its suddenness. The coffin was soldered up on the fourth day after the death. Two days afterwards, Sir William, in consequence of the rumours which had reached him of the manner of his ward's death, and that suspicions were entertained that he had died from the effect of poison, wrote a letter to the prisoner, requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted. He accordingly sent for them, but did not exhibit Sir William Wheeler's letter alluding to the suspicion that the deceased had been poisoned,

nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary sudden death, and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination, on the ground that it might be attended with personal danger. On the following day, a medical man, who had heard of their refusal to examine the body, offered to do so; but the prisoner declined his offer, on the ground that he had not been directed to send for him. On the same day the prisoner wrote to Sir William a letter, in which he stated that the medical men had fully satisfied the family, and endeavoured to account for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination. Three or four days afterwards, Sir William, having been informed that the body had not been examined, wrote to the prisoner insisting that it should be done; which, however, he prevented, by various disingenuous contrivances, and the body was interred without examination.

In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred, and examined on the eleventh day after death. Putrefaction was found to be far advanced; the head was not opened, nor the bowels examined, and in other respects the examination was incomplete. When Lady Boughton, in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve, and endeavour to check her; and he afterwards told her that she had no

occasion to have mentioned that circumstance, but only to answer such questions as were put to her; and in a letter to the coroner and jury, he endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish. Experiments made by the administration of laurel-water on various animals produced convulsions and sudden death, and on opening one of them a strong smell of laurel-water was perceived.

Upon the trial, four medical men, three physicians, and an apothecary, were examined on the part of the prosecution, and expressed a very decided opinion—mainly grounded upon the symptoms, the suddenness of the death, the *post-mortem* appearances, the smell of the draught, as observed by Lady Boughton, and the similar effects produced by experiments upon animals—that the deceased had been poisoned with laurel-water; and one of them stated that, on opening the body, he had been affected with a peculiar acrimonious, biting sensation in the hands and mouth, like that which affected him in all the subsequent experiments with laurel-water. An eminent surgeon and anatomist, examined on the part of the prisoner, stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection indicated nothing but putrefaction.

Mr. Justice Buller, in his charge to the jury, called their attention to the suddenness of the death immediately after the administration of the draught

—to the opinions of the medical witnesses that there was nothing to lead them to attribute death to any other cause than that draught; to the prisoner's misrepresentations as to the deceased's state of health at a time when he appeared to others to be in good health and spirits; to his contrivances to prevent the examination of the body, and emphatically to the fact of his having rinsed out the bottle from which the draught had been taken, "which," said the learned Judge, "does carry with it strong marks of knowledge by him that there was something in that bottle which he wished should never be discovered"; and, finally, to his attempts to check the witness who spoke to that circumstance while giving her evidence before the coroner. The prisoner was convicted and executed (*q*).

This trial has given rise to much difference of opinion. Certainly the medical evidence was unsatisfactory, and there was no evidence to prove that the prisoner had been distilling laurel-water or to connect him with the fatal draught, although it was proved that he had a still in which he used to distil roses. But the manner in which death occurred, at the very instant of taking the draught, was all but conclusive that it contained some poisonous ingredient which was the cause of death; and though this fact alone would not have excluded the hypothesis of a sudden death from accident or natural cause, its conjunction with so many circumstances of moral conduct of deep inculpatory import could admit of explanation only on the hypothesis of the

(*q*) Shorthand Report by Gurney, 1781. See p. 37, *supra*.

prisoner's guilt. It is impossible to regard those circumstances in any other light than as the necessary indications, on the ordinary principles of human nature, of the moral causal origin of the fatal catastrophe (r).

Robert Sawle Donnell, a surgeon and apothecary, was tried at Launceston spring assizes, 1817, before Mr. Justice Abbott, for the murder of Mrs. Elizabeth Downing, his mother-in-law.

The prisoner and the deceased were next-door neighbours, and lived upon friendly terms ; and there was no suggestion of malice, nor could any motive be assigned which could have induced the prisoner to commit such an act, except that he was in somewhat straitened circumstances, and in the event of his mother-in-law's death would have become entitled to a share of her property. On the 19th of October the deceased drank tea at the prisoner's house, which was handed to her by him, and returned home much indisposed, retching and vomiting, with a violent cramp in her legs, from which she did not recover for several days. About a fortnight afterwards, after returning from church, and dining at home on boiled rabbits smothered with onions, upon the invitation of her daughter she drank tea in the evening at the prisoner's house with a family party. The prisoner on this occasion also handed to the deceased cocoa and bread and butter, proceeding towards her chair by a

(r) The account of this case in *The Theory of Presumptive Proof* (London, 1815) suppresses many of the most important facts, and is in other respects partial, garbled, and inaccurate ; the strictures upon the trial are most unfair, and the book itself is utterly unworthy of the author to whom it is commonly ascribed.

circuitous route ; but it was stated to have been his habit to serve his visitors himself, and not to allow them to rise from their chairs. When Mrs. Downing had drunk about half of her second cup, she complained of sickness and went home, where she was seized with retching and vomiting, attended with frequent cramps ; and then a violent purging took place, and at eight o'clock the next morning she died. None of the other persons who had been present on either of these occasions were taken ill. To a physician called in by the prisoner two or three hours before her death, he stated that she had had an attack of *cholera morbus*. The nervous coat of the stomach was found to be partially inflamed or stellated in several places, and the villous coat was softened by the action of some corrosive substance ; the blood-vessels of the stomach were turgid, and the intestines, particularly near the stomach, inflamed. The contents of the stomach were placed in a jug, in a room to which the prisoner (to whom at that time no suspicion attached) had access, for examination ; but he clandestinely threw them into another vessel containing a quantity of water. The prisoner proposed that the body should be interred on the following Wednesday, assigning as a reason for so early an interment that from the state of the corpse there would be danger from keeping it longer—a statement for which there was no foundation. He also evinced much eagerness to accelerate the funeral, urging the person who had the charge of it, and the men who were employed in making the vault, to unusual exertions.

The physician called in to the deceased con-

cluded from the symptoms, the shortness of the illness, and the morbid appearances, that she had died from the effects of some active poison; and in order to discover the particular poison supposed to have been used, he applied to the contents of the stomach the tests of the ammoniacal sulphate of copper, or common blue vitriol, and the ammoniacal nitrate of silver, or lunar caustic, in solution, which severally yielded the characteristic appearances of arsenic, the sulphate of copper producing a green precipitate, whereas a blue precipitate is formed if no arsenic is present, and the nitrate of silver producing a yellow precipitate, instead of a white precipitate, which is thrown down if no arsenic is present. He stated that he considered these tests conclusive and infallible, and that he had used them because they would detect a minute portion of arsenic; on which account he considered them to be more proper for the occasion, as, from the smallness of the quantity, from the frequent vomitings and purgings, and the appearance of the tests, he found there could not be much. Concluding that bile had been taken into the stomach, he mixed some bile with water, and applied to the mixture the same tests, but found no indication of the presence of arsenic; from which he inferred that the presence of bile would not alter the conclusion which he had previously drawn. Having been informed that the deceased had eaten onions, he boiled some in water; and after pouring off the water in which they were boiled, he poured boiling water over them and left them standing for some time, after which he applied the same tests to the

solution thus procured, and ascertained that it did not produce the characteristic appearances of arsenic. The witness, upon his cross-examination, admitted that the symptoms and appearances were such as might have been occasioned by some other cause than poisoning; that the reduction test would have been infallible; and that it might have been adopted in the first instance, and might also have been tried upon the matter which had been used for the other experiments. Upon his re-examination he accounted for his omission of the reduction test by stating that the quantity of matter left after the frequent vomitings and the other experiments would have been too small, and that it would not have been correct to use the matter which had been subjected to the preceding experiments.

Several medical witnesses, called on the part of the prisoner, stated that the symptoms and morbid appearances, though they were such as might and did commonly denote poisoning, did not exclude the possibility that death might have been occasioned by *cholera morbus* or some other disease; that the tests which had been resorted to were fallacious, since they had produced the same characteristic appearances upon their application to innocent matter, namely, the sulphate of copper a green, and the nitrate of silver a yellow precipitate, on being applied to an infusion of onions; and that the experiment with the bile was also fallacious, since, from the presence of phosphoric acid, which is contained in all the fluids of the human body, the same coloured precipitate would be thrown down by putting lunar caustic into a solution of phosphate of soda.

The learned Judge, in his charge to the jury, said that none of the evidence of the witnesses for the prisoner went to show that the tests employed by the medical witnesses on the other side would not prove that arsenic was there if it were really there ; that the experiments made by the witnesses for the prisoner were made with onions in a different state from what onions boiled with rabbits are, as by that mode could be got a great portion of the juice or strength of the onions, in water, whereas in regard to onions prepared for the table, or boiled with a considerable quantity of water, a good portion of their juice is withdrawn from them ; that as to the experiment with the bile, if there were no phosphoric acid in the stomach of the deceased, or no quantity of it sufficient to produce that appearance, whatever might have been the appearance if sufficient were put in, then the experiment was tried on something that did not contain a sufficient quantity of that matter ; that although the same result might be produced by that matter, if there, yet if there is no reason to suppose that that matter was there or there in sufficient quantity, then he thought the suspicion that arsenic was there was very strong. His Lordship also said : “ If the evidence as to the opinions of the learned persons who have been examined on both sides should lead you to doubt whether you should attribute the death of the deceased to arsenic having been administered to her, or to the disease called *cholera morbus*—then, as to this question as well as to the other question, the conduct of the prisoner is most material to be taken into consideration ; for he, being a

medical man, could not be ignorant of many things as to which ignorance might be shown in other persons: he could hardly be ignorant of the proper mode of treating *cholera morbus*; he could not be ignorant that an early burial was not necessary; and when an operation was to be performed in order to discover the cause of the death, he should not have shown a backwardness to acquiesce in it; and when it was performing, and he attending, he could not surely be ignorant that it was material for the purposes of the investigation that the contents of the stomach should be preserved for minute examination" (s). His Lordship also said: "The conduct of the prisoner, his eagerness in causing the body to be put into a shell, and afterwards to be speedily interred, was a circumstance most material for their consideration, with reference to both the questions he had stated; for although the examination of the body in the way set forth, and the experiments that were made, might not lead to a certain conclusion as to the charge stated, that the deceased got her death by poison administered to her by the prisoner, yet if the prisoner as a medical man had been so wicked as to administer that poison, he must have known that the examination of the body would divulge it" (t). Notwithstanding this adverse charge of the learned Judge, the prisoner was acquitted.

A medical man was tried for the murder of his wife, by the administration of prussic acid. They left their place of residence at Sunderland on a

(s) Shorthand Report by Frazer (1817), p. 161. (t) *Ibid.* p. 170.

journey of pleasure to London, where they arrived on the 4th of June, and went into lodgings. On the morning of the 8th, being the Saturday after their arrival in town, the prisoner rang the bell for some hot water, a tumbler and a spoon, and he and his wife were heard conversing in their chamber. About a quarter before eight he called the landlady upstairs, saying that his wife was very ill ; the landlady found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the mouth. The prisoner said she had had fits before, but none like this, and that she would not come out of it ; and on being urged to send for a doctor, he said he was a doctor himself, that he should have let blood before, but that there was no pulse, that this was an affection of the heart, and that her mother died in the same way nine months before ; and he put her feet and hands in warm water, and applied a mustard plaster to her chest. In the meantime a medical man was sent for, but she died before his arrival. There was a tumbler close to the head of the bed, about one-third full of a clear white fluid, and an empty tumbler on the other side of the table, and a paper of Epsom salts. In reply to a question from the medical man, the prisoner stated that the deceased had taken nothing but a little salts. On the same morning he ordered a grave for interment on the Tuesday following.

The contents of the stomach were found to contain prussic acid and Epsom salts ; and it was deposed that the symptoms were similar to those of death by prussic acid, but they might be the effect of any powerful sedative poison, and that the means resorted to by

the prisoner were not likely to promote recovery, but that artificial respiration and stimulants were the appropriate remedies, and might probably have been effectual. The prisoner had purchased prussic acid and acetate of morphine on the previous day, from a vendor of medicines with whom he was intimate ; he had, however, been in the habit of using these poisons, under advice, for a complaint in the stomach. Two days after his wife's death he stated, to the medical man who had been called in, that on the morning in question he was about to take some prussic acid ; that on endeavouring to remove the stopper he had some difficulty, and used some force with the handle of a tooth-brush ; that the neck of the bottle was broken by the force, and some of the acid spilt ; that he placed the remainder in the tumbler, and went into the front room to fetch a bottle in which to place the acid, but instead of doing so, began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bedroom ; that he immediately went to her ; that she exclaimed that she had taken some hot drink, and called for cold water, and that the prussic acid was undoubtedly the cause of her death.

Upon being asked what he had done with the bottle, he said he had destroyed it, and assigned as the reason why he had not mentioned the circumstances before, that he was distressed and ashamed at the consequences of his negligence. According to the opinions of the medical witnesses, after the scream or shriek, volition and sensibility must have ceased, and speech would have been impossible.

To various persons in the north of England the prisoner wrote false accounts of his wife's state of health. In one of them, dated from the Euston Hotel, the 6th of June, he stated that she was unwell, and had two medical gentlemen attending her, and that he was apprehensive of a miscarriage. In another, dated the 8th, he stated that he had had her removed to private lodgings, where she was under the care of two medical men, dangerously ill; that symptoms of premature labour had come on, and that one of the medical men had pronounced her heart to be diseased. At the date of this letter his wife was cheerful and well, and all these statements respecting her health were false; indeed they had not been to any hotel, but had gone into lodgings on their arrival in London. In a letter dated the 9th, he stated the fact of her death, but without any allusion to the cause of it; which suppression, in a subsequent letter, he stated to have been caused by the desire of concealing the shame and reproach of his negligence. His statement to his landlady that his mother-in-law had died from disease of the heart was a falsehood, he himself having certified to the registrar of burials that bilious fever was the cause of her death. The deceased was entitled to some leasehold property, to which the prisoner would become entitled absolutely if he survived her, and to a copyhold estate which was limited to the joint use of herself and her husband, so that the survivor would take the absolute interest. The motive suggested for the commission of the alleged murder was, that the prisoner might become at once the absolute owner of his wife's property.

Mr. Baron Gurney said that this case differed from almost every other case he had ever known, in this circumstance, that generally there was a difficulty in ascertaining whether the death had been caused by poison, and whether the poison came from the hands of the person charged with the crime ; but that in this case there could be no doubt that the deceased had come to her death by a poison most certain, fatal, and speedy in its effects, and that it was equally certain that it came from the hands of the prisoner. It had been proved beyond all doubt that the prisoner had bought the poison, and had placed or left it unprotected in the chamber of his wife, and the question was, whether, she having died from poison, it had been administered to her by his hand, or whether he had purposely placed it in her way in order that she might herself take it. The secrets of all hearts were known to God alone, and human tribunals could only judge of those secrets from the conduct of the individual at the time. In this case the jury had the conduct of the prisoner, his words, his writing, his demeanour, proved before them, and it would be for them to decide, upon the whole case, whether they believed he had administered the poison, or placed it within the reach of the deceased in order that she might take it. If he had done either of those things, he would be guilty of murder ; if they thought he had merely acted incautiously and negligently by leaving the poison in the way in which he had left it, he had not been guilty of murder. He dwelt upon the circumstances that the parties had lived for a year and a half together upon terms of mutual affection, that the marriage took place with

the consent of the lady's mother, with whom they had lived till her death, that the visit to London was well known to their friends, and that the place to which she was taken was where he had lodged before, and near the residence of the only two persons with whom he was acquainted in London.

When any person committed a heinous crime, it was usual and natural, said the learned Judge, to look whether there existed any adequate motive to the commission of it. The prisoner being about thirty, and his wife about twenty-two years of age, it would be a good deal to say that the desire to possess her property should be brought forward as a great motive of interest to excite to the commission of such a crime. Nevertheless, it was sometimes found, as they could not dive into the heart and ascertain motives, that a grave crime might be committed, although no motive for it could be found. Inasmuch as the great question the jury had to decide was the intention of the prisoner, it should be remembered that a man was entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty ; and they would take care to give what fair allowance they could in putting a construction upon the prisoner's words and actions. He also laid stress upon the conduct of the prisoner to his wife, and his general good character for kindness. He could not conceive the motive which should have induced the prisoner, in the letter posted on the 6th, when his wife was well and cheerful, to write so complete a fabrication from beginning to end, of her being unwell and attended by two

medical men; and the jury would observe that it was written on the very day on which the prisoner had made arrangements for her residence with a friend during his absence abroad. When the letter of the 8th was written did not appear, but it was proved to have been posted on the evening of that day. If it was written before the death, it told against the prisoner. It concurred with the letter written on the 6th, and practised the same deception, as to the two medical men, upon those to whom it was addressed.

The defence was, that the prisoner had been guilty of a lamentable indiscretion; that a sudden event, fatal to his wife, had happened; that he was overpowered and overwhelmed by the result of his own carelessness, and that he did not like to divulge the truth. The awkward fact, however, was, that in his last letter he had pursued exactly the same system as that adopted in the letter written two days before. They would recollect, with reference to the letter of the 8th, that on that day he had more than once exclaimed, "This is all my fault." These outbreaks were of some importance for the consideration of the jury in giving, as compared with the letters, all indulgent consideration to any language used by the prisoner, after an event had occurred which placed him in a situation of difficulty and embarrassment. In comparing the statement set up for the defence with the evidence of the medical witnesses, two things were of a good deal of importance. The prisoner's statement was, that when he entered the bed-chamber, his wife told him what had occurred, and that he took the

tumbler out of her hand. The medical men had told the jury that with the scream that had been spoken of, all volition and power of speech would cease ; but here it must not be forgotten that the judgment of these gentlemen must be received with this caution, that none of them had ever witnessed the effect of prussic acid on the human frame. It was for the jury to decide whether they were convinced, beyond any reasonable doubt, that the prisoner either administered, or in effect caused to be administered, poison to the deceased ; if, on the other hand, they should be of opinion that he had been merely guilty of indiscretion, and that, in consequence of the sudden and awful event which had occurred, he had been driven to conceal it by falsehood, they would acquit him. No doubt falsehood often placed persons having recourse to it under awkward and menacing circumstances. In this case, falsehood had been much resorted to. It was shown before the death, in the statement about the two medical men ; that falsehood was followed up and repeated in the second letter ; another falsehood appeared in the representation that his mother-in-law, who had died of bilious fever, as appeared by an entry in the register under his own hand, had died of disease of the heart. If they thought the case conclusive, however painful it might be, it would be their duty to pronounce the prisoner guilty ; but if they thought it left in doubt and mystery, so that they could not safely proceed, they would remember that it was better that many guilty men should escape than that one innocent man should perish. The prisoner was acquitted (*u*).

(*u*) *Reg. v. Belaney*, C. C. C., Sess. Pap., Aug. 1844.

Palmer's case is perhaps the most remarkable one of this nature on record. The prisoner who lived at Rugeley, had been a medical practitioner, but had given up his profession for the pursuits of the turf, in the course of which he became intimate with a young man named Cook, who was addicted to the same pursuits. By extensive gambling transactions Palmer became involved in great pecuniary difficulties, and was ultimately driven to the desperate expedient of borrowing money at exorbitant rates of interest, and to the commission of forgeries on a large scale. In 1855 he was indebted in about £20,000, borrowed at sixty per cent. interest upon bills (all of which bore the forged acceptances of his mother), and secured in part by the assignment of a policy of assurance for £13,000 on the life of his brother, who died in August of that year. To this source the prisoner had looked for relief from his embarrassments, but the office, having become acquainted with circumstances which induced them to dispute the validity of the policy on the ground of fraud, declined to pay the sum assured; and in consequence the holder of some of these bills issued writs against the prisoner and his mother, which were sent into the country, to be served unless he should effect some satisfactory arrangement. Exposure, ruin, and punishment thus became imminent, unless some means could be devised of averting the impending disclosures.

On Tuesday the 13th of November, Cook and Palmer were at Shrewsbury races, where Cook won between £2,000 and £3,000, of which he received £700 or £800 on the course; the remainder was

payable in London on the following Monday (the 19th). He was greatly excited by his success, and the prisoner and several other persons spent the following evening with him, after the conclusion of the races, at his inn in Shrewsbury. In the course of the evening the prisoner was seen in the passage outside his own room, holding up a tumbler to a gas-light; after which he went, with the tumbler in his hand, into the room where Cook and his other friends were sitting. Soon afterwards, on drinking some brandy and water, Cook became suddenly ill, with violent vomiting, and it was necessary to call in medical assistance. He said he had been dosed by the prisoner, and handed the money he had about him, between £700 and £800, to a friend to take care of, who returned it to him the next morning, after his recovery.

Notwithstanding these suspicious circumstances, such was the prisoner's influence over his infatuated victim, that Cook returned from Shrewsbury to Rugeley in company with him on the evening of Thursday (the 15th), when, on their arrival, Cook went to his lodgings at the Talbot Arms, and the prisoner to his own house opposite. On the Saturday and Sunday the prisoner called many times to see Cook, who was repeatedly taken sick and ill after taking coffee and broth from the hands of the prisoner. On Monday (the 19th) he got up much better, and the prisoner called upon him early in the morning, but did not see him again until eight or nine in the evening, having in the interim, as it turned out, been to London. In the course of that evening Cook's medical attendant, who had previously seen

him, left at the Talbot Arms a box of morphine pills, which was taken into his bedroom by the prisoner, who administered the pills. Shortly afterwards the household was disturbed by screams proceeding from the patient's room. He was found sitting up in bed, in great agony, beating the bed-clothes, gasping for breath, convulsed with a jerking and twitching motion all over his body, and one hand clenched and stiff, but conscious, and calling to those about him to send for the prisoner. In about half an hour the paroxysm subsided, and he became composed.

On the next morning (Tuesday the 20th), after taking coffee from the hand of the prisoner, Cook was again affected with violent vomiting, which continued throughout the day; but in the evening he was better, and in good spirits. About seven o'clock he was visited by his medical attendant, whom the prisoner urged to repeat the morphine pills, as on the night before; and they went together to the surgery, where pills were prepared and delivered to the prisoner, who took them away, and went to Cook's room about eleven o'clock, as was intended and supposed, for the purpose of administering them to him; so that he had the opportunity in the interval of changing them, which there can be no doubt he did. Cook strongly objected to take them, because he had been made so ill the night before; but his objections were overcome by the prisoner, and at length he swallowed the pills presented to him. Soon after midnight he became ill with the same agonising symptoms as on the preceding night, and again desired that the

prisoner should be sent for. Such was the rigidity of his limbs that it was found impossible to raise him up, and he asked to be turned over on his side; after which the action of the heart gradually ceased, and in a quarter of an hour he was dead. After death, the body was bent back like a bow, and if it had been placed upon a level surface it would have rested upon the head and heels.

Upon receiving information of the young man's death, his step-father, who lived in London, went to Rugeley, arriving on Friday (the 23rd), to make arrangements for his funeral, and to inquire into the state of his affairs, as well as into the circumstances of his illness. On stating to the prisoner that he understood he knew something of his affairs, he was told by the prisoner that there were £4,000 worth of bills of the deceased's out, to which his (the prisoner's) name was attached, and that he had got a paper drawn up by a lawyer, signed by the deceased, to show that he had never received any benefit from them. The step-father then inquired if there were no sporting debts owing to him, to which the prisoner said there was nothing of the sort; and on asking about the betting-book, which could not be found, the prisoner said it would be of no use if found, as when a man dies his bets are done with.

Other facts now began to turn up throwing a sinister light upon the mysterious events of the last few days. It was discovered that the prisoner had procured three grains of strychnia on the Monday evening, and a second quantity of six grains on the following day; that he had been seen to search the

pockets, and to grope under the pillow and bolster of the unfortunate man before his body was cold ; that although Cook's betting-book was kept on the dressing-table of his bedroom, and was seen there on the previous night, it was never seen after his death ; that the prisoner handed to a friend of the deceased five guineas as the whole of the money that was found belonging to him ; that he had been to London on the Monday, and procured payment of upwards of £1,000 on account of the wagers won by the deceased at Shrewsbury, and appropriated the amount in payment of his own losses, and in part payment of the forged acceptances on which writs had been issued ; that before the races he was short of money, and had borrowed £25 ; that he had lost largely at the races, but had subsequently paid considerable sums to various creditors ; that two or three days after Cook's death he had endeavoured to obtain the attestation by an attorney to a forged acknowledgment in the name of the deceased that £4,000 of bills had been negotiated by the prisoner for his benefit ; and, finally, had prevailed upon the medical man who had attended the deceased, who was of a very advanced age, to certify that he had died of apoplexy.

A *post-mortem* examination was made, at which the prisoner was present, and the stomach and intestines were placed in a jar to be taken to London for examination. While the operation was going on, the prisoner pushed against the medical men engaged in it, so as to shake a portion of the contents of the stomach into the

body. The jar was then covered with parchment, tied down, and sealed and placed aside; and while the attention of the medical men was still engaged in examining the body, the prisoner removed the jar to a distance, near a door not the usual way out of the room, and it was found that two slits had been cut with a knife through the double skin which formed the covering. The prisoner having learned that the jar was to be sent to London the same evening, offered the driver who was to carry the persons in charge of it to the railway station, £10 to upset the carriage and break the jar. The analytical chemists, to whom the stomach and intestines, and, subsequently, other parts of the body, were sent, found traces of antimony, but none of strychnia, or any other poison; and sent their report by post, directed to the attorney at Rugeley employed in the investigation. The prisoner incited the post-master to betray to him the contents of this report; and wrote a confidential letter to the coroner, to whom during the course of the inquiry he sent presents of fish and game, stating that he had seen it in black and white that no strychnia, prussic acid, or opium had been found, and expressing his hope that on the next day to which the inquest stood adjourned, the verdict would be that of death from natural causes. The coroner's jury found a verdict of wilful murder against the prisoner.

Upon the trial the chemical witnesses examined on the part of the prosecution stated that the stomach and intestines were received in an unfavourable state for finding strychnia had it been there, inasmuch as the stomach had been cut from end to end, and the

contents were gone, and the mucous surface, in which any poison, if present, would naturally be found, had been lying in contact with the intestines and their succulent contents, and shaken up with them; that the non-discovery of strychnia did not conclusively prove that death had not been caused by that poison, inasmuch as they had failed to discover it in animals killed for the purpose of experiment; that if a minimum dose is administered, it disappears by absorption into the blood; that it is discoverable, and had been discovered when administered to animals in excess of the quantity required to destroy life, but that there was no known process by which it could be discovered in the tissues, if present there only in a small quantity. On the other hand, witnesses were called on behalf of the prisoner, who disputed the theory of absorption, and stated that strychnia, if present, is always discoverable, not only in the blood and in the stomach and intestines, and their contents, but also in the tissues; that there was nothing in the condition of the parts of the body submitted to examination to preclude the detection of strychnia; and that, if present, it might have been found, even if it had been administered in a minimum dose, though, on this latter point, there was some difference of opinion among them.

Numerous medical witnesses of the highest professional experience and character, called on the part of the Crown, deposed that many of the symptoms, especially in the progress and termination of the attack, were not those of any of the ordinary forms of tetanus, idiopathic or traumatic, or of any

known disease of the human frame, but were the peculiar characteristics of poisoning by strychnia. Nor were there in these respects any such differences between their opinions and those of many respectable professional witnesses called on the part of the prisoner, as might not be accounted for by the imperfect state of knowledge of all the forms of tetanic affection, or by the defects of the physiological and pathological science of the day. Of the numerous professional witnesses examined on behalf of the prisoner, some ascribed the symptoms to tetanic affection; others to various forms of disease from which they were shown to be clearly distinguishable; while others, again, ascribed them to physical causes absolutely absurd and incredible. The contradictions and inconsistencies in the testimony of some of the prisoner's scientific witnesses, and their obtrusive zeal and manifest purpose of obtaining an acquittal, deprived it of all moral effect, and drew down upon several of them the severe reprehension of the Court.

After a protracted trial of twelve days, the prisoner was found guilty, and was executed pursuant to his sentence (*x*); and there is no doubt that this was only one of several murders perpetrated by this great criminal, by the same nefarious means, for the purpose of obtaining money secured by fraudulent life assurances (*y*).

(*x*) C. C. C. 1856, *coram* Lord Campbell, L.C.J. See Sessions Papers for official shorthand minutes of evidence, also Shorthand Report.

(*y*) See Ann. Reg. 1855 (Chr.), p. 190. The technical nature of the evidence in Smethurst's case (p. 138, *supra*) would render it inapplicable in illustration of *legal* principles, even if doubt had not been thrown upon the verdict by the grant of a pardon.

## SECTION 5.

APPLICATION OF THE GENERAL PRINCIPLE TO PROOF  
OF THE CORPUS DELICTI IN CASES OF INFANTICIDE.

OF the various forms of criminal homicide, that of Infanticide, by which is popularly understood the murder of a recently born infant—committed as it most frequently is for the purpose of concealing its birth—perhaps presents the greatest difficulties in the establishment of the *corpus delicti*.

(1.) In addition to the sources of difficulty and fallacy which are incidental to charges of homicide in general, there are many circumstances of embarrassment peculiar to cases of this nature, amongst which must be mentioned the occasional uncertainty and inconclusiveness of the symptoms of pregnancy (the fundamental fact to be proved), which may resemble and be mistaken for appearances caused by obstructions or spurious gravidity (2). In a remarkable case of imputed murder of an adult female, the suspicion of pregnancy arose principally from the bulk of the deceased while living, coupled with circumstances of conduct which denoted the existence of an improper familiarity between her and the prisoner, and from the discovery, upon *post-mortem* examination, of what was believed by the witnesses for the prosecution to be the placental mark. Four medical witnesses expressed the strongest belief that the deceased had been recently delivered of a child nearly come to maturity ;

(2) *Rex v. Bate*, Warwick Summer Assizes, 1809. *Rex v. Ferguson*, Burnett's Criminal Law of Scotland, p. 574.

while, on the other hand, it was proved that she had been subject to obstructions; and it was deposed that the appearances of the uterus might be accounted for by hydatids, and that what was thought to be the placental mark might be the *pediculi* by which they were attached to the internal surface of the womb (*a*). The learned Judge said to the jury, that it was a very unfortunate thing that upon every particular point they had to rest upon conjecture; that it was a conjecture to a certain extent that the deceased was with child, that it was conjecture to a certain degree that any means were used to procure abortion; and, if they were used, that it was conjecture that the prisoner was privy to the administration of them.

(2.) It must be shown that a child has been born alive, and acquired an independent circulation and existence; it is not enough that it has breathed in the course of its birth (*b*); but if a child has been wholly born, and is alive, and has acquired an independent circulation, it is not material that it is still connected with its mother by the umbilical cord (*c*), nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after birth (*d*).

(*a*) *Rex v. Angus*, Lancaster Autumn Assizes, 1808, *coram* Chambre, J., Shorthand Report; and see Burnett's Criminal Law of Scotland, p. 575.

(*b*) *Rex v. Poulton*, 5 C. & P. 329; *Rex v. Enoch*, *ib.* 539; *Rex v. Crutchley*, 7 *ib.* 814; *Rex v. Sellis*, *ib.* 856; *Reg. v. Handley*, 13 Cox, C. C. 79.

(*c*) *Reg. v. Reeves*, 9 *ib.* 25; *Reg. v. Wright*, *ib.* 754; *Reg. v. Trilloe*, 1 C. & M. 650.

(*d*) *Rex v. Brain*, 6 C. & P. 349.

Whether a child has been born alive or not is frequently a question of considerable difficulty ; and it is an admonitory consideration, that scientific tests which have been considered as infallible, with the advance of knowledge have been found to be fallacious. Such is the case with respect to the hydrostatic test, from the indications of which in former times many women have suffered the last penalty of the law. On the trial of a woman at Winchester spring assizes, 1835, it was proved that the lungs were inflated, which the medical witness said would not have been the case if the child had been still-born ; but, in answer to a question from Mr. Baron Gurney, he also said that if the child had died in the birth, the lungs might have been inflated, upon which the learned Judge stopped the case (*e*). A single sob, it appears, is sufficient to inflate the lungs, though the child died in the act of birth (*f*). A young woman was tried before Mr. Baron Parke for the murder of her female child ; the throat was cut, and the wound had divided the right jugular vein ; the lungs floated in water, and were found on cutting them to be inflated ; but it was deposed that this test only showed that the child must have breathed, and not that it had been born alive, and that there are instances of children being lacerated in the throat in the act of delivery. On the close of the case for the prosecution, the learned Judge asked the jury whether they were satisfied that the child was born alive, and that the wound was inflicted by the prisoner

(*e*) *Rex v. Simpson*, Cummin on the Proof of Infanticide, 40.

(*f*) *Rex v. Davidson*, Hume's Commentaries on the Criminal Law of Scotland, vol. i., p. 292 (note 3).

with the intention of destroying life; as, if they entertained any doubt on these points, it would be unnecessary to go into the evidence on behalf of the prisoner. The jury returned a verdict of acquittal (*g*).

(3.) It is a further source of uncertainty in cases of this nature that circumstances of presumption frequently adduced as indicative of the crime of murder, may commonly be accounted for by the agency of less malignant motives. Concealment of pregnancy and delivery may proceed even from meritorious motives, as where a married woman resorted to such concealment in order to screen her husband, who was a deserter, from discovery (*h*). The struggle between the opposing motives of shame and affection must be severe before a mother can contemplate, and still more so, before she can form and execute, the unnatural resolution of taking away the life of her own offspring. The unfortunate subject of these conflicting motives is frequently the victim of deceit and treachery, and is almost always deserted by one who was, if not her seducer, at least the partner of her frailty. The world is not lenient in such cases, though scarcely any condition of human weakness can be imagined more calculated to excite the compassion of the considerate and humane (*i*). The wisdom and humanity of the legislature, in accordance with the spirit of the times, led, though tardily, to the repeal (*k*) of the cruel rule of presumption created by

(*g*) *Rex v. Grounall*, Worcester Spring Assizes, 1837.

(*h*) *Rex v. Stewart*, Burnett's Criminal Law of Scotland, p. 572.

(*i*) Hume, see note (*f*) *supra*, vol. i., p. 291.

(*k*) St. 43 Geo. III. c. 58, s. 3.

Statute 21 Jac. I. c. 27, and suggested by a corresponding edict of Henry II. of France, which made the concealment of the birth of an illegitimate child by its mother conclusive evidence of murder, unless she made proof by one witness at least that the child was born dead. The rule too long survived the age in which it originated, and under it many women must have unjustly suffered (*l*). By the repealing statute the endeavour to conceal the birth of a child by burying, or otherwise secretly disposing of the body, instead of being treated as a conclusive presumption of murder, was made a substantive misdemeanour (*m*).

(4.) The casualties which, even in favourable circumstances, are inseparable from parturition, must be greatly aggravated by the perplexities incidental to illegitimate, clandestine, and unassisted birth, from the impulses of shame and alarm, the desire of concealment, the want of assistance and sympathy, and occasionally from the mother's inability to render the attentions requisite to preserve infant life; and there have been cases in which even the very means resorted to, under the terror of the moment, to facilitate birth, have been the unintentional cause of death. For these reasons, wounds and other marks of violence are not necessarily considered as indicative of wilful injury, and are not therefore sufficient to warrant a conviction of murder,

(*l*) Hume, see note (*f*) *supra*, vol. i., p. 292.

(*m*) See now St. 24 & 25 Vict. c. 100, s. 60. See Russell on Crimes (6th ed.), vol. iii., p. 162, for the history of the legislation upon this subject.

unless the concomitant circumstances clearly manifest that they were knowingly inflicted upon a body born alive. Nor are these principles of construction peculiar to our own law; it is believed that they prevail generally, if not universally, in the application of the criminal law to cases of this nature (*n*).

It follows from these considerations, that though the facts may justify extreme suspicion that death has been the result of intentional violence, yet if they do not entirely exclude every other hypothesis by which it may be reasonably accounted for, sound principles of justice, and a proper regard to the fallibility of human judgment in cases so difficult as these often are, combine to render a conviction for concealment of birth a safer result than a conviction for murder. No one, however, who has seen much of cases of this kind, can have any serious doubt that in many of them there is the strongest suspicion of murder, and one very good reason why concealment of birth should be punishable is that very often the acts of the mother have rendered it impossible to ascertain whether there has or has not been foul play.

It has been thought that in these cases feelings of humanity have been permitted to bias the strict course of judicial truth, and that subtle and strained hypotheses have been used to explain circumstances of conclusive presumption. That this does some-

(*n*) Alison's Principles of the Criminal Law of Scotland, vol. i., p. 159.

times happen cannot be denied, and if so, it is a proof that the law is not in harmony with public feeling; but it may be doubted whether in this reproach sufficient weight has always been given to the difficulties inseparably incidental to the proof of this crime. It is, however, well deserving of consideration, whether the ends of public justice and social protection might not be better promoted by the abolition of capital punishment in a class of cases in which society will not concur in its infliction, and by the substitution of a minor punishment, not only in the case of concealment of birth, but generally in all cases where death has been caused by the wilful omission of the mother to take the necessary means for the preservation of infant life (*o*), so as to avoid on the one hand the scandal and ill example of acquittals in the face of convincing evidence of guilt, and on the other, of doing violence to public feeling by capital convictions in the case of a crime which, bad as it is, is nevertheless wanting, as an eminent prelate has remarked, "in all the attributes which distinguish the murder of adults, viz. the wickedness of the motive, the danger to the community, and the feeling of alarm and insecurity which it occasions" (*p*).

(*o*) See Code Pénal d'Autriche, prem. partie, ch. xvi., art. 122.

(*p*) Whately on Secondary Punishments, p. 108, App. No. 2; and see Selections from the Charges, etc., of Mr. Baron Alderson, 78.

It might have been supposed that the neglect to take any precaution to preserve the life of the infant would be evidence of manslaughter; but the practical difficulties in the way of obtaining a conviction for manslaughter, under the circumstances in question, may be said to be insuperable. The neglect must be one occurring after the child has acquired its separate existence, that is, at a time when all the considerations in favour of the accused, which are pointed out in the text,

The discussion and illustration of the rules and principles of evidence, in reference to the proof of the *corpus delicti*, might be extended to an examination of their application to other offences ; but the subject has been sufficiently exemplified for the purposes of this Essay, and such an extended examination would therefore be superfluous. The cases which have been cited strikingly exhibit the strict accordance between judicial practice and the dictates of enlightened reason.

operate with their utmost strength. It would not seem unreasonable if the omission to make any preparation for the birth of a child, where that event is foreseen, leading as it constantly does to the death of the child, were to be visited with **some minor punishment.**



## AMERICAN NOTES.

[NOTE TO CHAPTER VII.]

### *Corpus Delicti — Meaning of the Term.*

Proof of the *corpus delicti* means proof that the crime charged has actually been committed by some one. The two principal elements are the facts which are the basis of the charge and the criminal agency in bringing those facts into existence. Best on Evidence, § 442; Pitts v. State, 43 Miss. 472; People v. Palmer, 109 N. Y. 113, 4 Am. St. Rep. 477. In People v. Simonsen, 107 Cal. 345, it is said: "The term *corpus delicti* means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the *corpus delicti*. It would simply establish the *corpus*."

### *Arson — What is the Corpus Delicti?*

Carlton v. People, 150 Ill. 186, 41 Am. St. Rep. 346; State v. Jones, 106 Mo. 302.

### *Proof of the Corpus Delicti.*

Proof of the *corpus delicti* consists of proof of the fact of death and of the means by which death was produced. One of these being proved, the other may be inferred from circumstantial evidence. These circumstances must be wholly inconsistent with the defendant's innocence. People v. Bennett, 49 N. Y. 137. But compare Campbell v. People, 159 Ill. 9.

To establish the *corpus delicti* in robbery, it is sufficient to show that a person had a sum of money before the event, that he became intoxicated, and was beaten into insensibility, after which his money was gone. Bloomer v. People, 1 Abb. Dec. 146.

*Corpus delicti* must be proved beyond a reasonable doubt. Norwood v. State, 45 Md. 68.

The *corpus delicti* need not be proved by "overwhelming proof," merely beyond a reasonable doubt. Zell v. Com., 94 Pa. 258.

In criminal cases the prosecution must prove, first, that an offence has been committed; and, secondly, that it was committed by the accused. *U. S. v. Woods*, 4 Cranch C. C. 484, Fed. Cas. No. 16760.

But although a jury ought to be very sure that a crime has been committed before convicting the accused, the evidence as a whole may leave no reasonable doubt as to the crime or its perpetrator, even though the evidence of the death or of any other material fact may be insufficient when taken alone. *Campbell v. People*, 159 Ill. 9; *State v. Williams*, 52 N. C. 446; *Com. v. Johnson*, 162 Pa. 63.

This is well illustrated in the case of *Com. v. Williams*, 171 Mass. 461.

The defendant was charged with the murder of one Gallo. Gallo's house was burned one night, and Gallo was never again seen, although he had been in the house in the evening before the fire. A body of uncertain sex was found in the remains of the house, and the clasp of a pocket-book like Gallo's near by. The fire effectually concealed all indications of violence, if there had been any.

But very early the next morning after the fire, the defendant arrived at a town three miles away in a disordered state and stained with blood. He told a story of having been robbed near a pond which he had passed. The vicinity of the pond showed no signs of a struggle, but there were tracks of a running man from Gallo's house to the pond.

On the day before the fire, the defendant was penniless and wanting money to go to Klondike. In telling of the robbery he said that he had sent for seventy-five dollars and was glad he had not received it. At nine o'clock on the same morning he said that he had sent for two hundred dollars and expected to hear before Saturday. At ten o'clock he produced a roll of bills, from which he took one of five dollars and spent the greater part of it. On the evening of the same day, after telling different stories to the police, when about to be searched, he produced a roll of five ten dollar and four five dollar bills, which at first he said his brother had sent to him by mail, and then declared that he found by the pond where he was assaulted as he was coming down. Upon an officer pressing him further, he turned very white, perspired, and

hardly could speak for a time, but persisted that he found the money as he said. Then the officers searched his room and found very bloody clothing and two secreted twenty-dollar goldpieces, of which at first the defendant denied knowledge, but which afterwards he said he found with the rest. It appeared that Gallo had had three twenty-dollar goldpieces, and some time before had been paid one hundred and nine dollars mostly in ten and five dollar bills. Gallo seemingly had no bank account, and seems to have kept his money as he earned it, except the very small sums which he had to spend for his living.

With reference to the question whether a crime had been committed, it should be added that the kerosene can usually kept by Gallo in another place was found in the bedroom, between the body and the place of the bed; and although we are not attempting to state details, it should be noticed as possibly significant that the defendant, when told that the Italian's shanty was burned and that he was burned in it, answered, "Was he all burned up?"

This evidence was held to be sufficient to warrant the jury in finding that beyond a reasonable doubt Gallo had been murdered and the defendant was guilty of the crime.

*Proof of Corpus Delicti by Circumstantial Evidence.*

Circumstantial evidence may be used in establishing the *corpus delicti*, but in such case the certainty attained must be equal to that attained from direct evidence. *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *State v. Flanagan*, 26 W. Va. 116.

All that is required is that the *corpus delicti* be proved beyond a reasonable doubt; the kind of evidence is immaterial. *Anderson v. State*, 24 Fla. 139; *State v. Keeler*, 28 Iowa, 551; *Brown v. State*, 1 Tex. App. 154; *Buel v. State*, 104 Wis. 132; *Campbell v. People*, 159 Ill. 9; *Com. v. Johnson*, 162 Pa. 63.

In *Reg. v. Mockford*, 11 Cox C. C. 16, the *corpus delicti* was established wholly by circumstantial evidence.

The defendant was charged with stealing certain chickens, and was convicted, although the owner of the chickens was unable to identify the ones taken or even to say whether any of his chickens were missing.

The same was true in *State v. Loveless*, 17 Nev. 424, where the defendant was convicted of stealing a calf.

Where the deceased was found lying dead at the foot of a railroad embankment, it was satisfactorily shown that he was murdered, by the facts that his wounds could not have been made by an engine, there was a pool of blood on the track and traces of dragging the body down the embankment, there was a club near by with which the blows might have been given, and the money the deceased had had was gone. *Williams v. State*, 61 Wis. 281.

To show that arsenic which had caused death was not administered to the deceased by a physician, he may show that he administered the same medicine to others with no ill effect. *Epps v. State*, 102 Ind. 539.

Blood stains near the place where a murder is alleged to have been committed and stains on articles belonging to deceased and found in possession of the accused are evidence of the *corpus delicti*. *Wilson v. U. S.*, 162 U. S. 613.

#### *The Fact of Death.*

The fact of the death of one alleged to have been murdered by the accused may be established by circumstantial evidence alone. *Johnson v. Com.*, 81 Ky. 325; *State v. Winner*, 17 Kan. 298.

The fact of the killing and death may be proved wholly by circumstantial evidence, but the jury should be warned to weigh it with unusual care. The finding of the corpse may not be necessary. *U. S. v. Brown*, Fed. Cas. 14, 656 a; *U. S. v. Gilbert*, 2 Summ. 19, Fed. Cas. 15204; *U. S. v. Matthews*, Fed. Cas. 15741 a; *Stocking v. State*, 7 Ind. 326.

"There is no one dominant part of the case which must be proved as directly as possible in the nature of things before evidence of a remoter kind is admissible to connect the defendant with the supposed crime. No doubt the jury ought to be very sure that a crime has been committed before they convict a person of having committed it. But even upon an indictment for murder, the evidence of the death as well as of every other material fact may be insufficient singly, and yet the evidence taken as a whole may leave no reasonable doubt of the crime or of the defendant's guilt. The facts in a circle support one another, when if any one were withdrawn, they would all fall to the ground." *Com. v. Williams*, 171 Mass. 461.

The *corpus delicti* is not sufficiently proved by the testimony of

a witness that the defendants tied himself and another, that they struck that other with a sword on the head and stabbed him in the back upon which he fell and had never been seen since. *People v. Ah Fung*, 16 Cal. 137.

Where the defendant was charged with the murder of his illegitimate child, newly born, the evidence showed that he hung it in a grain sack in a tree where its cries were heard, that afterwards he took it away and it was not again seen. *Held*, not sufficient proof that the child was dead. *People v. Callego*, 133 Cal. 295.

After the State has shown *prima facie* the death of the deceased, it requires the same weight of evidence on the part of the defence to show that the person claimed to be deceased is still alive as to establish an alibi. *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753.

See remarks of Chief Justice Shaw in *Com. v. Webster*, 5 Cush. 295, 323: "We now come to consider that ground of defence on the part of the defendant which has been denominated, not perhaps with precise legal accuracy, an *alibi*; that is, that the deceased was seen elsewhere out of the Medical College after the time when, by the theory of the proof on the part of the prosecution, he is supposed to have lost his life at the Medical College. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the Court are of opinion that this proof is material; for, although the time alleged in the indictment is not material, and an act done at another time would sustain it, yet in point of evidence it may become material; and in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the Medical College, and that he lost his life therein, if at all, the fact of his being seen elsewhere afterwards would be so inconsistent with that allegation that, if made out by satisfactory proof, we think it would be conclusive in favor of the defendant."

#### *Body of Deceased Need not be Found.*

Where the body of deceased cannot be found, because lost at sea, other evidence may prove the *corpus delicti*. *U. S. v. Williams*, 1 Cliff. 5, Fed. Cas. 16707.

Where it was claimed that the body had been burned, it was shown that certain metallic articles of dress such as deceased had sometimes worn were found in the ashes of a fire. *State v. Williams*, 52 N. C. 446, 78 Am. Dec. 248.

Either the body must be found and identified, or criminal acts must be proved sufficient to account for death and the absence of the corpse. *Ruloff v. People*, 18 N. Y. 179.

To show that the deceased came to his death by drowning at sea, the master of the vessel from which he was missed may testify that he saw no vessels for several days before and after the deceased was missed. *St. Clair v. U. S.*, 154 U. S. 134.

### *Identity of the Body in Homicide.*

Where the body of the deceased or its identity has been totally destroyed by fire or otherwise, the *corpus delicti* may be proved by circumstantial evidence. *State v. Williams*, 52 N. C. 446, 78 Am. Dec. 248.

It may be shown by any sort of evidence, if that evidence establishes it beyond a reasonable doubt. *Timmerman v. Terr.*, 3 Wash. T. 445, 17 Pac. 624.

The evidence to identify a decomposed body with that of the murdered man was held sufficient where the body corresponded in size, height, and color of the hair, and that the clothing was the same as that worn by deceased. *State v. Downing*, 24 Wash. 340.

In *McCulloch v. State*, 48 Ind. 109, all that was found of the body of the person alleged to have been murdered was a human skeleton of the size and sex of that individual.

This proof with circumstantial evidence of the cause of death and of the identity of the skeleton proved the *corpus delicti*.

The father of the deceased was allowed to testify that he recognized the body from the description given by others. *Taylor v. State*, 35 Tex. 97.

### *Personal Peculiarities.*

A skull identified by the formation of the teeth and jaws. *Gray v. Com.*, 101 Pa. 380.

The following circumstances were held sufficient to prove the *corpus delicti*. A negro boy disappeared when there was no

known motive or intention to leave. Later a headless trunk was found in a sack, and the severed legs were found in another. These were identified as parts of the body of the boy, by scars on the leg, by the color of the skin, and the size. The shirt was also identified. The boy's head was never found. *Lancaster v. State*, 91 Tenn. 267.

In *Lindsay v. People*, 63 N. Y. 143, to identify a decomposed body, evidence was given as to similarity of color of hair and beard, of size and stature, and a dentist testified as to missing and mended teeth.

*Identification of Body by Articles of Property.*

Articles found on a dead body may be used to identify it. *State v. Dickson*, 78 Mo. 438.

A burned and mutilated body identified by the charred cloth and a slate-pencil once carried by the deceased. *State v. Martin*, 47 S. C. 67.

*Photographs to Identify Body.*

A photograph of the deceased may be used to identify the body. *Beavers v. State*, 58 Ind. 530.

Witness allowed to testify that a mutilated, discolored face resembled a photograph. *Udderzook v. Com.*, 76 Pa. 340.

*Proof of Identity of the Body May Be Necessary.*

Where a body is found, and there is great reason to suppose that the body would be found if a homicide had been done, there can be no conviction unless the body be sufficiently identified. *People v. Wilson*, 3 Parker Cr. Rep. 199.

Where defendant was charged with murdering A, it was proved that A had disappeared and that a body was found in the river six hundred miles down stream. The body was not identified as that of A, and although there was circumstantial evidence that defendant was guilty, there could be no conviction. *Walker v. State*, 14 Tex. App. 609.

"The fact of the identity of the body of the deceased with that of the dead body, parts of which were found at the Medical College, is a material fact, necessary to be established by the proof. Some evidence has been offered, tending to show that the shape,

size, height, and other particulars respecting the body, parts of which were found and put together, would correspond with those of the deceased. But, inasmuch as these particulars would also correspond with those of many other persons in the community, the proof would be equivocal and fail in the character of conclusiveness upon the point of identity. But other evidence was then offered, respecting certain teeth found in the furnace, designed to show that they were the identical teeth prepared and fitted for Dr. Parkman. Now, if this latter fact is satisfactorily proved, and if it is further proved to a reasonable certainty that the limbs found in the vault and the burnt remains found in the furnace were parts of one and the same dead body, this would be a coincidence of a conclusive nature to prove the point sought to be established; namely, the fact of identity. Why, then, it may be asked, is the evidence of height, shape, and figure of the remains found given at all? The answer is, because it is proof of a fact not repugnant to that of identity, but consistent with it, and may tend to rebut any presumption that the remains were those of any other person, and therefore, to some extent, aid the proof of identification. The conclusion must rest upon a basis of facts proved, and must be the fair and reasonable conclusion from all such facts taken together." *Com. v. Webster*, 5 Cush. 295, 313.

*Opinion as to Identity.*

A witness cannot give his opinion that a decomposed body is the body of the deceased in question, but must give facts upon which such an opinion is to be based. *People v. Wilson*, 3 Parker Cr. Rep. (N. Y.) 199.

*Cause of Death.*

To show the cause of death, the state of the health of the deceased prior to his being wounded may be shown. *Phillips v. State*, 68 Ala. 469.

The character and location of the wounds on the body of the deceased may be proved to show the cause of death. *People v. Wright*, 89 Mich. 70; *Basye v. State*, 45 Neb. 261.

The defendant, charged with homicide, may show that the licentiousness and drunkenness of the deceased could account for her death, but particular acts of drunkenness cannot be shown

unless in some way related to her death. *Com. v. Ryan*, 134 Mass. 223.

A conviction cannot be supported where the circumstances are consistent with the theory of natural death. *Dreessen v. State*, 38 Neb. 375.

The body of the deceased had finger prints on the neck, bloody lips, a twisted arm, and the tongue was forward in the mouth. Physicians testified that he had been strangled. This was held to be sufficient evidence to establish the *corpus delicti*. *Com. v. Bell*, 164 Pa. 517.

Where the deceased lived nine months after being wounded, and the cause of death is doubtful, the *corpus delicti* is not established. *Treadwell v. State*, 16 Tex. App. 560.

The cause of death is sufficiently shown by proof that blows were given with a dangerous weapon, that deceased became insensible, and soon after died. *U. S. v. Wiltberger*, Fed. Cas. 16738.

Where a child was thrown overboard, the burden is on the prosecution to show that it had not already died in a fit. *U. S. v. Hewson*, Fed. Cas. 15360. But in *U. S. v. Knowles*, Fed. Cas. 15540, 4 Sawy. 517, where defendant was charged with failure to rescue a sailor who had fallen overboard and the defence was that the sailor was dead from the fall, it was held that defendant must at least raise a reasonable doubt as to the sailor's being alive when he fell into the water.

The defendant must be acquitted unless the State shows by what means the deceased came to his death. *Cole v. State*, 59 Ark. 50. But the exact weapon with which death was caused need not be proved. *State v. Cushing*, 29 Mo. 215.

#### *Death Indirectly Caused.*

The assault of the defendant need not have been the immediate cause of death, as where it brought on pleuro-pneumonia causing death. *Burnett v. State*, 82 Tenn. 439.

A conviction will be sustained where death was brought on by fright caused by the defendant's violence. *Cox v. People*, 80 N. Y. 500.

In *Baker v. State*, 30 Fla. 41, it appeared that the deceased had been on a spree and had complained of pain in his head. The

immediate cause of his death appeared to be a blood-clot on the brain, but the defendant had given him two blows in the face not ordinarily dangerous. The doctors were in doubt as to the cause of the blood-clot, but a verdict of manslaughter was sustained.

So in *State v. O'Brien*, 81 Iowa, 88, a conviction of manslaughter was sustained where the defendant had beaten and frightened the deceased, who was afflicted with heart disease and who died thirteen days later.

*Accident as a Defence.*

The State must prove criminal intent beyond a reasonable doubt, and therefore it must show beyond a reasonable doubt that a shooting was not accidental. *State v. Cross*, 42 W. Va. 253.

To show that a homicide was accidental, the defendant may show that he carried his gun and his money in the same pocket, and removed the one to get at the other. *State v. Wright* (Iowa), 84 N. W. 541.

*Accident—Evidence in Rebuttal.*

The theory of accident may be rebutted by proof of Prior attempts. *Nicholas v. Com.*, 91 Va. 741.

To rebut defendant's claim that he shot to frighten only, the State may show the severity of the wound, its direction, and the proximity of defendant when he fired. *State v. Hamilton*, 170 Mo. 377.

Where the defendant claimed that a shooting was accidental when he was on his hands and knees, it was shown that the bullet entered between the eighth and ninth ribs and ranged downwards. *State v. Turlington*, 102 Mo. 642.

In *Nicholas v. Com.*, 91 Va. 741, where the deceased came to his death by drowning, the possibility of accident was rebutted by the following circumstantial evidence. The boat in which the defendant and deceased were, was found with three newly-bored auger holes near the place where defendant sat, the holes equalling in size an auger possessed by the defendant. He was guilty of illicit intercourse with the deceased's wife both before and after the event. He had predicted the sudden death of the deceased from heart disease, and had once attempted to poison him. He had that day induced the deceased to accompany him across the river, knowing that the deceased could not swim. He objected

to an investigation of the occurrence and behaved in a suspicious manner. He was convicted of murder in the first degree.

Previous threats of the defendant received to show that the homicide was not accidental. *State v. Lee*, 58 S. C. 335.

To show that a homicide was not accidental, it may be shown that the defendant turned on a witness of the act and assaulted and threatened him. *Snodgrass v. Com.*, 89 Va. 679.

Where the defendant is charged with drowning his wife by upsetting a canoe and holding her under, and he claims that he was trying to save her, he may be shown to have had feelings of hostility toward her. *Smith v. State*, 92 Ala. 30.

In *Makin v. Att'y Gen.*, 17 Cox Cr. 704, where the crime charged was the murder of an illegitimate infant by one who had taken charge of it, it was shown that twelve other infants were found buried at various places where the defendant had lived, that their deaths had not been reported, and that some of them had been received under the same circumstances as had the deceased in question to show design and to rebut a claim of accident.

#### *Evidence of Suicide.*

The defendant may show the possibility or the probability that the wound causing death may have been inflicted by the deceased himself. *State v. Lee*, 65 Conn. 265.

Where defendant alleges that the deceased committed suicide he need not establish it by a preponderance of the evidence. *Persons v. State*, 90 Tenn. 291.

The defendant may show that the deceased, a pregnant unmarried woman, had declared her intention to commit suicide on the day before her death. *Com. v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235. In *Blackburn v. State*, 23 Ohio St. 146, the defendant was allowed to prove such declarations, even though they were made six years prior to death, such remoteness merely affecting the weight of the evidence. But see *State v. Kelly*, 77 Conn. 266.

#### *Suicide—Declarations of Deceased.*

In *Com. v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235, where the defendant was charged with the murder of a girl who was pregnant by him, it was held competent for the defendant to show

that the deceased knew that she was pregnant and was contemplating suicide. Evidence was offered to show that on the day before her death the deceased called upon a trance medium to consult her, and in the course of their conversation said she was going to drown herself. The next day the deceased disappeared, and later she was found drowned. It was held to be error to exclude the testimony of the medium. The existence of an intention on the 22d of December is evidence that the intention may have existed on the next day also, and that the intention may have been carried out. Such evidence is not admissible when the intention was too remote in time from the act, but it was not so here.

The Court says: "The burden was on the Commonwealth to prove beyond a reasonable doubt that the defendant killed the deceased, and to do this the jury must be satisfied beyond a reasonable doubt that she did not kill herself. The nature of the case proved by the Commonwealth was such, that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had had no such intention. If it could be shown that during the week before her death she had actually attempted to drown herself and had been prevented from doing it, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt, and accomplished her purpose."

As to whether or not the deceased's declarations of her intention were admissible to prove that such an intention actually existed, the Court says: "On principle, therefore, we think it clear that, when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person or his behavior, or his actions generally. In the present case, the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased." See also *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *State v. Kelly*, 77 Conn. 266.

*Rebuttal of Evidence of Suicide.*

In *People v. Hamilton*, 137 N. Y. 531, where the defendant was charged with the murder of his wife, he set up an alibi and produced a letter from his wife indicating her infidelity and that she contemplated suicide. But three witnesses positively testified that he was with his wife, near the scene and at the time of the crime. The theory of suicide was shown to be untrue by the manner in which her throat was cut. A cuff-button from defendant's clothes, his razor, and his cane were found near the body. He told two different stories as to her having his cane. The letter purporting to come from his wife was shown not to be in her handwriting. The two had not lived together peaceably and the wife had had defendant arrested several times for non-support. A verdict of guilty was not set aside.

Where the death appears to have been either a homicide or a suicide the State may show the absence of any motive for suicide and the deceased's station and surroundings in life. *State v. Lentz*, 45 Minn. 177.

To rebut the theory of suicide evidence of experiments may be introduced showing the effect of a pistol-shot on muslin at short distances. *Sullivan v. Com.*, 93 Pa. 284.

To rebut the theory of suicide the State may show that when last seen the deceased was happy and in good spirits, by testimony of witnesses and by letters written by her. *State v. Baldwin*, 36 Kan. 1; *Morrison v. State*, 40 Tex. Crim. 473; *Com. v. Trefethen*, 157 Mass. 180.

*Instances of Sufficient Proof.*

The conviction was sustained where a body, partly burned and cut to pieces, was found in the defendant's house, hair like that of the deceased was found on a bloody axe, and clothing like that of the deceased was found in the house. The defendant had been seen burning meat, which he said was pork rinds, and he made various incriminating statements. *People v. Beckwith*, 108 N. Y. 67.

If the injuries caused by the defendant were sufficient to cause death, and no other possible cause appears, the cause of death is sufficiently established against the defendant. *People v. O'Connell*, 78 Hun, 323.

Where the defendant struck the deceased, and the latter fell dead, and later scalp wounds were found which penetrated the skull, a verdict of guilty was not set aside, although it was shown that such a wound seldom if ever causes instantaneous death and that the post-mortem examination had not been a complete one. *State v. Lucy*, 41 Minn. 60.

It is enough to show that the deceased was severely wounded with a pistol, and died two days later, even though no physician testifies as to cause of death. *State v. Murphy*, 9 Nev. 394; compare *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488.

The commission of the crime is sufficiently proved when it is shown that the defendant fired a pistol at the deceased from within six inches of his breast, after a careful aim; that the deceased groaned and fell, and died about five minutes thereafter. *Mitchum v. State*, 11 Ga. 615; *State v. Moody*, 7 Wash. 395 (a similar case).

Where the body of a man who had disappeared while working with the defendant was afterwards found buried near the spot where they worked and was identified by the clothing, color of hair and beard, and the fact that a certain tooth was missing, and wounds sufficient to cause death were also shown, it was held that there was sufficient proof of the *corpus delicti*. *State v. Dickson*, 78 Mo. 438.

*Corpus delicti* sufficiently established, but defendant not sufficiently identified as the criminal. *State v. Crabtree*, 170 Mo. 642.

#### *Insufficient Proof of Corpus Delicti.*

Where the defendant was charged with killing his partner, who had disappeared and was last seen with the defendant, it was shown that the deceased drew five hundred dollars from the bank, and later the defendant had at least that much money; that there was the remains of a fire on the defendant's premises, in which were found a few human bones, some buttons, teeth, and a lock of hair; the fire seemed not to have been a very hot one; the lock of hair was the same color as the hair of the man who had disappeared; it was not gray, however, while the hair of the man was gray. It was held that the *corpus delicti* was not established. *Gay v. State* (Tex.), 60 S. W. 771.

Where one physician thought death due to a wound over the eye, and others thought it just as probable that death was due to alcoholism, the *corpus delicti* is not established. *People v. Kerrigan*, 84 Hun, 609.

Where it was shown that the deceased was a drunkard and a prostitute, and that her death from cerebral hemorrhage might have been caused by a fall while climbing through a transom, or by a beating given by the defendant, a conviction was set aside. *McNamee v. State*, 34 Neb. 288.

The cause of death is not sufficiently proved by merely proving a shooting and the fact that the person shot is dead, where neither the attending physician nor any one present at the death is produced. *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488; compare *State v. Murphy*, 9 Nev. 394.

In *State v. Flanagan*, 26 W. Va. 116, a conviction was set aside because the following evidence of the *corpus delicti* was not sufficient. The deceased woman was found burned in her log cabin, where she lived alone. The surrounding snow showed no tracks. The defendant had been with the deceased the day before, but not that night, as far as the evidence showed, and he had no motive for the crime. None of deceased's property was found in defendant's possession. The fire might easily be accounted for in other ways.

In *State v. Billings*, 81 Iowa, 99, where defendant was charged with homicide, it was shown that the killing occurred in an office after an altercation, with no third person present, that two shots were heard closely following each other, that defendant came running out with a bullet wound in his back, and that deceased was found with a pistol having two empty chambers near his hand and a wound in his head that must have been made when the revolver was within two inches of his face. These circumstances were held not sufficient to sustain a conviction for a crime.

The *corpus delicti* was held to be insufficiently proved on the following evidence. The man alleged to have been killed left in company with the defendant on October 25. On the 25th of November succeeding, a body was found in a creek. Clothing on the body was said by witnesses to belong to the man who had disappeared. He had had a considerable sum of money, and the defend-

ant knew it. The defendant was later found in possession of the horse that the man had ridden away. Physicians testified, on the other hand, that the body was so decomposed as to have required from three to five months. One witness swore that the clothing on the body had never belonged to the man, and another testified that the parties had traded horses. When the man left he expressed the intention of not returning. *Monk v. State*, 27 Tex. App. 450.

*Corroboration of Confession Required.*

The uncorroborated extrajudicial confession of the defendant is not sufficient evidence of the *corpus delicti* in homicide. *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *Bartley v. People*, 156 Ill. 234; *Heard v. State*, 59 Miss. 545.

In *Paul v. State*, 65 Ga. 152, the confession of the defendant was corroborated by proof of the *corpus delicti* as follows: Near a spring where he said he had switched the deceased girl were found switches with evidences of use, a broken rail with blood on it, and the body of the girl with a fractured skull.

A confession of the defendant that he had killed his three months' old child was held to be sufficiently corroborated by the following proof of the *corpus delicti*. Where defendant said he had buried the child, the ground was found scratched up, and scattered about were bits of small bones, locks of hair like that of the child, and some pieces of clothing that were fairly well identified. Under the Texas statute, a conviction cannot be had upon a confession merely, unless the body or portions of it be found and identified. *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247.

Where the defendant had told a witness that he hit the deceased on the head and killed him, and a physician testifies that wounds on the head might have caused death, the proof is sufficient. *Custis v. Com.*, 87 Va. 589.

The fact that a murder has been done is proved sufficiently to permit the introduction of the defendant's confession, when it is shown that the deceased disappeared without reason, that defendant was near at hand and had threatened her life, that a skull and jaw bone were found in a stream near by and identified as those of the deceased by a lock of hair still attached and the shape of the jaw. *Gray v. Com.*, 101 Pa. 380,

*Same Evidence to Prove Corpus Delicti and Guilt.*

The very same evidence which establishes the *corpus delicti* may also establish the fact that the defendant committed the crime. See *Com. v. Williams*, 171 Mass. 461; *Com. v. Johnson*, 162 Pa. 63; *Gannon v. People*, 127 Ill. 507.

In *Com. v. Johnson*, 162 Pa. 63, the defendant was shown to have driven away in a buggy with his four year old child. He said he was taking her home. He was shiftless and had refused to support his child, but his wife had left the child with him. He came back without the child, and the next day her hat was found near the river, and later the child's body was found in the river. Defendant gave contradictory and false accounts of what he had done with the child, and he was convicted.

In *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147, the proof of the *corpus delicti* was as follows: The defendant and his six year old stepson went fishing one April morning when there was still snow on the ground. At noon the defendant returned alone, saying that the boy was to follow with a shovel. Later the defendant and another went to look for the boy and they found all his clothing on the bank and his dead body naked in the stream. From the clothing to the water the ground was soft, and there were the tracks of a man, but no marks of a boy's bare feet. At the edge of the water were prints of the boy's fingers as if he had been trying to crawl out. There were some marks of violence on the body. The defendant showed grief at the boy's death, but he also showed that he expected to be accused of the murder. He had previously been cruel to the boy. After the arrest he made two desperate escapes. He was convicted.

*Proof of Defendant's Guilt—Illustrative Homicide Cases.*

The State need not prove the exact weapon with which death was caused. *State v. Cushing*, 29 Mo. 215.

In the case of *Cicely v. State*, 13 Smedes and M. (Miss.) 203, the defendant, a slave, was accused of the murder of Dr. and Mrs. Longon and two children with a broadaxe. The following is from the opinion at page 218:

"From this statement of the testimony, the facts which militate against the accused, and lead to the conclusion of her guilt, are:

"1. Her presence at the commission of the homicide, and the perfect means which were at her command for the accomplishment of her object.

"2. The fact that from the door of the house, in the walk, to the spot where the corpse of Mrs. Longon was found, during the night, after cautious and careful examination, there were discovered but two sets of tracks or 'footprints,' one of which was supposed to be those of the deceased, and the other corresponded with those of the accused.

"3. The fact that at the place where the homicide was committed the traces of a scuffle were visible, and the prints of feet were discovered which corresponded with the tracks of the accused.

"4. The fact that from the point at which the corpse was found to the gate, there was found but one set of tracks, and they corresponded with those of the accused.

"5. The prisoner's declining to advance into the light at Brown's, where the witness Perry was standing with others, and her retreat into a dark corner.

"6. The statement prisoner made to witness, James E. Watts, in the road between Longon's and Brown's, before any suspicion of her agency in the murder had arisen in the mind of the witness. She stated that after the robbers had killed Longon and his family, Mrs. Longon and herself ran out of the house, and were pursued by the robbers, who overtook Mrs. Longon and killed her where she lay; but that she outran Mrs. Longon, and escaped, and ran over to Brown's.

"7. The stains of blood upon the front of her dress. Witness says, 'There were many specks and spots on it.'

"8. The blood stain upon the pantaloons pocket of Longon, coupled with her possession of his purse, secreted, and her ignorance of the amount of its contents.

"9. The improbable version she gave of the whole transaction, and her palpably contradictory statements."

In Richardson's "Medical Microscopy," 295, is given the following account of the conviction of a woman of cutting her child's throat: "Upon being searched, there was found in the woman's possession a large and sharp knife, which was at once subjected to a minute and careful examination. Nothing, however, was found upon it, with the exception of a few pieces of hair adhering to the handle,

so exceedingly small as scarcely to be visible. The examination being conducted in the presence of the prisoner and the officer remarking, 'Here is a piece of fur or hair on the handle of your knife,' the woman immediately replied, 'Yes, I dare say there is, and very likely some stains of blood, for, as I came home, I found a rabbit caught in a snare, and I cut its throat with a knife.' The knife was sent to London, and with the particles of hair, subjected to a microscopic examination. No trace of blood could at first be detected upon the weapon, which appeared to have been washed; but upon separating the horn handle from its iron lining, it was found that between the two a fluid had penetrated which turned out to be blood — certainly not the blood of a rabbit, but bearing every resemblance to that of the human body. The hair was then submitted to examination. Without knowing anything of the facts of the case, the microscopist immediately declared the hair to be the hair of a squirrel. Now, round the neck of the child at the time of the murder, there was a tippet or 'victorine,' over which the knife, by whomever held, must have glided, and this victorine was of squirrel's fur.

"This strong circumstantial evidence of the guilt of the prisoner was deemed by the jury sufficient for a conviction, and whilst awaiting execution, the wretched woman fully confessed her crime."

"In *McCann v. State*, 13 Smedes & M. (Miss.) 471, the body of the deceased was found partly eaten by hogs, but was identified by the clothing and the bones of his foot. The manner in which the murder was done is shown as follows:

"It is almost certain that the murder was committed with a pistol; the smoke and powder upon the surface and edges of the wound, and upon the hat, show that it was fired in immediate contact with the person. The blood upon the right stirrup leather, which was the side next the woods, connected with the impression upon the tree, goes to show that he was shot upon his horse, and the range of the ball likewise shows that the person who fired was on horseback. The impression of the ball upon the side of the tree next the road, and the finding of the flattened ball at the foot of the tree, prove that the shot did not proceed from a person concealed in the woods. It is very certain that the ball could not have killed him after it struck the tree and fell upon the ground. It is a fair conclusion, then, that the pistol was fired by

some one on horseback in the road very near to the decedent, who was higher than the deceased bending forward on his small horse, and that the ball entered the neck, passed through the lower part of the head, and came out on the right side, detaching a portion of the bone, and having nearly spent its force, struck the tree and fell at its foot. As it was after night, the murderer had to be near his victim to be sure of his aim. It will be remembered that the prisoner rode a good-sized horse, and if he perpetrated the deed from his saddle, was elevated enough above the decedent to give the ball the direction it took. Soon after the report of the gun, the rapid galloping of a horse was heard, going from the direction of the place of the murder towards the house of old Mr. McCann; a rider was seen upon him, and he took an unfrequented bypath through the woods, which led in a more direct course to the house than the road. It is not shown that any one else went to the house that night." *McCann v. State*, 13 Smedes & M. (Miss.) 471, 494.

*Trial of John C. Colt.*

One of the most dreadful trials in the history of criminal jurisprudence was that of John C. Colt in New York in the year 1841, reported in full in "Remarkable Trials" at page 226.

Colt was the brother of Col. Samuel Colt, the revolver manufacturer. He had an altercation in his own office with one Samuel Adams, a printer, over a printing account, and killed Adams there with a hatchet. No one saw the act, but the suspicion of others in an adjoining room was aroused by the noises. Colt, after the evidence of the prosecution was all in, admitted that he killed Adams, but claimed that he did the deed in self-defence.

After killing Adams, Colt locked himself in the room, where he remained until dark. That night he boxed up the body of Adams and washed up the blood stains, throwing ink about to further conceal the traces of the blood. He addressed the box to a person in St. Louis, and the next morning had it carted on board the vessel Kalamazoo, bound for New Orleans. The absence of Adams and the suspicion of Colt led to the recovery of the body before the sailing of the vessel.

When Colt was first asked about the noise in his room on the previous afternoon, he asserted that he had not been in his room

at all that afternoon. The second time he was questioned by the same party, he replied: "To tell you the truth, Mr. Wheeler, I upset my table, spilt my ink, and knocked down the books, making a deuced muss."

When the body was discovered, it was much decomposed, but it was identified by the clothing and by a ring worn by Mr. Adams. His watch and watch key were found in Colt's trunk at home.

To determine the cause of death and to show also that many of the blows could not have been given in self-defence, the skull of the murdered man himself was exhumed and produced in court. This certainly must be a very unusual proceeding. That it should be of doubtful propriety, unless absolutely necessary, would be indicated by the following excerpt:

"The skull was then handed to Dr. Rogers by the coroner and exhibited to the jury. Never was there a more thrilling sight. The court-room was crowded to excess, and the head was held up in his fingers by Dr. Rogers. He placed the corner of the axe in the hole over the left ear, which precisely fitted it. He then put the hammer part in the fracture or indentation on the other side, which joined in it fairly as a mould. He then explained the wounds in front. It was, indeed, a dreadful sight.

"Colt held his hands over his eyes while the examination was going on.

"The jaw-bone was also produced, which was broken in halves. Dr. Archer went on to explain the nature of the wounds, and the head was minutely examined by the jurors."

Evidence was given indicating that any one of the blows, whose effects were shown, would have rendered Mr. Adams *hors de combat*, and therefore indicating also that the blows had been given viciously and not in self-defence. But physicians testified for the defence that a man might continue to fight after receiving a fatal blow on the head, and counsel argued that "General Hamilton, on being shot, sprung from the ground before he fell; and young Austin, after he had been shot in the head, advanced upon Selfridge, and struck him some violent blows before he fell dead."

The reporter modestly adds that "previous to this thrilling examination, all the ladies in court had retired."

The report is notable also for the full confession of Colt, given to the jury by one of the attorneys. It admitted the killing, but

described a struggle with the deceased in which the deceased was choking the defendant. This confession could not but have injured the case of the defendant, for in it he enumerated all the horrid and gruesome details of how he struck the blows, how he bent and tied up the body, how he nailed the box and had it taken to the ship, and how he later washed up the traces of the blood. The confession gives almost a worse impression of the defendant and his case than did the evidence of the prosecution.

The case was conducted with unusual bitterness between the district attorney, Mr. Whiting, and the attorneys for the defendant, Robert Emmett and Mr. Selden.

After considerable deliberation, the jury brought in a verdict of murder in the first degree. On being sentenced Colt made some remarks, exhibiting what the Court then characterized as "callous and morbid insensibility." The defendant was sentenced to be hanged.

Several desperate efforts were made to assist Colt to escape, and a doctor even agreed to attempt Colt's resuscitation after he should be cut down. On the day fixed for his execution he was married to Caroline Henshaw, with whom he had lived as husband and wife, and who had borne him a son. A few moments before he was to be brought forth from his cell, he committed suicide with a knife that had been secretly handed to him. At the same moment the cupola of the Tombs was found to be in flames.

#### *The Trial of Professor John W. Webster.*

Probably the most celebrated case in the criminal annals of the United States is the case wherein Prof. John W. Webster, of the Harvard Medical College, was tried for the murder of Dr. George Parkman of Boston. It is celebrated not only for the standing and connection of the parties affected, but for the circumstances of the murder and of the concealment and discovery of the body, and for the learning and ability with which the case was argued and decided.

Lemuel Shaw, the great Chief Justice of Massachusetts, presided, assisted by Judges Wilde, Dewey, and Metcalf. The Attorney General, John H. Clifford, assisted by George Bemis, conducted the prosecution; Pliny Merrick and Edward D. Sohier, the defence.

It is a case also where both the *corpus delicti* and the guilt of the defendant were almost established by circumstantial evidence, and the rulings of the Court are of unusual importance and have been quoted liberally throughout this work.

On November 23, 1849, Dr. George Parkman disappeared from his home. He was a strict and punctual man, and his family were alarmed merely by his failure to appear at dinner. The following day search was begun and rewards were offered, the entire police force of Boston and many friends of Dr. Parkman engaging in the search.

With considerable difficulty his course on the fatal day was traced to the Harvard Medical College, and beyond that he could not be traced. A superficial search was made at the college building, but nothing was found, and no serious suspicion at first attached to Professor Webster.

Gradually, however, such suspicion centred on him. It was shown that he had long owed Dr. Parkman a debt which he was unable to pay, that he had secured payment of the sum due by a mortgage on a mineral collection, and that he had later given a bill of sale of those very minerals to another man. Dr. Parkman had learned of this, regarded Webster's action as contemptibly dishonorable, and told him so. On this day he had gone with Professor Webster's notes to demand payment once more, and this time expecting to be paid.

After their disappearance, Professor Webster asserted that he had paid Dr. Parkman in full, the sum being nearly \$500.00, and he produced the note, cancelled merely with the stroke of a pen, yet he was unable to account for where he had obtained the money with which to pay the note, and all the money that he actually had received recently was shown to have gone elsewhere.

The janitor of the Medical College especially became suspicious, and began a search on his own account. He knew that for the greater part of several days after the disappearance of Dr. Parkman, including a Sunday, Professor Webster had been busy working in his laboratory, with the doors locked—an unusual occurrence. A hot fire had been kept in an assay furnace not often used, and water had been running at unusual hours. Further, Professor Webster's appearance had seemed strange to him, and Webster had presented him with a Thanksgiving turkey—an unprecedented occurrence.

At last the janitor decided to dig from the outside through the wall of a private privy in Professor Webster's laboratory, since he could not investigate the privy from the inside. Professor Webster had by artifice kept the searchers away from it. In that privy the janitor found portions of human legs. Immediately, Professor Webster was arrested, and a thorough search of the premises was made. In a tea-chest, well covered over, was found the trunk of a man. In the ashes of the assay furnace were found the remains of some artificial teeth and numbers of bones. The head had apparently been wholly consumed, for no other traces were found of it.

That these scattered remains were portions of Dr. Parkman's body soon became clear. In the first place the other members of the medical faculty, one of whom was Oliver Wendell Holmes, were able to account for every cadaver that the college had received, and they had no record of this body. Next, a careful study of the remains was made by several medical men of high standing, a complete catalogue of the various bones and portions found was made, and in no case was any portion duplicated. That was almost proof positive that all the pieces had belonged to one body. Further, the hair on the trunk was like that of Dr. Parkman, the skin was that of a man of about sixty (his age), and the legs were well muscled out of proportion (Dr. Parkman had been a great walker). The friends of Dr. Parkman were unable to identify the remains positively, but all doubt was cleared up by the testimony of a certain dentist who had made the set of artificial teeth. The recent death of this dentist has just been noticed by the newspapers, fifty-five years later, and the memories of the famous case recalled. The teeth had come out of the fire in fair condition, and still bore marks by which the dentist positively identified them as the same that he had made and fitted for Dr. Parkman. The Doctor's mouth had been of very peculiar shape, and he had ordered the teeth to be made for a special occasion in a hurry, the dentist working at them all through one night; so there was reason for the dentist's clear remembrance.

When Professor Webster was first arrested he was very much affected. He became so ill he could not stand, became almost hysterical, and at one time bit at a glass given him with water to drink. Yet later he recovered his composure and bore himself well through the trial.

In the same vault where the legs were found were also some towels marked with Webster's name and stained with blood. Spots were found on some of his clothing.

It was shown that the chief of police had received certain letters, while the search was being prosecuted, the purpose of which was very evidently to direct the search into other places than the college. These letters were unsigned, but were shown to be in Webster's handwriting. They had been written not with a pen and not with a brush, but with a swab. A stick with a wad of cotton on one end was found in the laboratory. It had been dipped in ink, and might have been used for writing the letters.

Some of the physicians testified that the body had been dismembered with professional skill; particularly was this true of the removal of the sternum from the trunk. Professor Webster had the skill and experience necessary.

While in the jail Professor Webster wrote a letter to his daughter, containing one little suspicious remark: "Tell mamma *not to open* the little bundle I gave her the other day, but to keep it just as she received it." This bundle was found to be some accounts with reference to the Parkman debt.

The defence was attempted along three lines: First, that Dr. Parkman was seen in Boston after leaving the Medical College. As to this there was a little very weak evidence. Second, the general unreliability of circumstantial evidence. And third, the previous good character of Professor Webster, and his natural conduct during the search for Dr. Parkman and up to the time of being arrested. Twenty-seven prominent citizens, including John G. Palfrey and Jared Sparks, the president of Harvard, were introduced to testify of the defendant's good character. The prosecution did not attempt to dispute it.

But the net of circumstantial evidence was so tightly drawn that there was no escape from it. Everything pointed to Webster as the guilty man. There was no reasonable doubt, either as to Parkman's felonious killing or as to the agency of the defendant therein. Professor Webster was found guilty of murder and sentenced to be hanged.

The means by which the murder was done were never proved. See Stone's Report and Bemis's Report.

*Poisoning Cases.*

*Cause of Death.*—Circumstantial evidence may be sufficient to establish the *corpus delicti* where the death was caused by poison. *Zoldoske v. State*, 82 Wis. 580.

The defendant, charged with poisoning the deceased, had confessed to administering stramonium. The deceased had died suddenly with symptoms of stramonium poisoning, but those symptoms are similar to the symptoms of several diseases. The doctors disagreed as to the real cause of death, and a conviction was set aside. *Pitts v. State*, 43 Miss. 472.

The cause of death by poisoning may be sufficiently established without any expert testimony and without any chemical analysis. *Johnson v. State*, 29 Tex. App. 150; *Polk v. State*, 36 Ark. 117.

But where there has been no analysis and no post mortem, although the defendant admits giving a certain draught, he should not be convicted when no motive for crime is shown and the defendant is not shown to have known that the draught contained poison. *Hatchett v. Com.*, 76 Va. 1026.

It may be proved by circumstantial evidence that the substance given to the deceased was poison. *Com. v. Kennedy* (Mass.), 48 N. E. 770.

To show that death was due to poison, a witness may testify as to the actions of the deceased at the time he is supposed to have been poisoned. *State v. David*, 131 Mo. 380.

*Expert Testimony.*

Examinations of stomach of deceased by chemists, physicians, and other experts. *State v. Cole*, 94 N. C. 958; *State v. Smith*, 102 Iowa, 656.

In *Stephens v. People*, 4 Parker Cr. Rep. (N. Y.) 396, the jury were instructed to disregard so much of chemical experiments on an exhumed body as were performed after a certain interested party had had access to the body and might have put arsenic in it.

It may be shown that a physician made a microscopical examination of the stomach and intestines of the deceased, that he found "tartar emetic," and he may state that in his opinion the

"tartar emetic" was the cause of death. *State v. Fournier*, 68 Vt. 262.

In *Com. v. Hobbs*, 140 Mass. 443, it was held to be not error to admit the testimony of a chemist that he had analyzed certain samples of meal and bread, into which the defendant was accused of putting poison, and found that they contained white arsenic; that he had analyzed the substance known as "Rough on Rats" (two boxes of which had been bought by the defendant), and found that it consisted of white arsenic colored with lampblack.

Where three attending physicians of good reputation testify that death was caused by morphine, and an autopsy performed by them fifty-five days after death showed morphine in the stomach and traces of its work throughout the body, a verdict of guilty was not set aside merely because experts testified for the defendant in such a way as to tend to cast a doubt upon the accuracy of the State's evidence as to the cause of death. *People v. Harris*, 136 N. Y. 423; *People v. Buchanan*, 145 N. Y. 1.

*Suicide by Poison.*

Where the defence is that the deceased committed suicide by taking the poison, it is admissible to show that she had strychnine and knew how to use it; but such facts cannot be proved by hearsay, and the statements of the deceased that she had strychnine would be hearsay merely. *State v. Kelly*, 77 Conn. 266, 271.

In *Shaw v. People*, 3 Hun, 272, the defendant was charged with poisoning his wife and three children. The defendant claimed that the wife had poisoned the children and herself because of jealousy of another woman. It was held error to exclude evidence that the wife had asserted that she had poison and knew how to use it, and that she would put the children "under the sod" before the other woman should have them.

*Suicide — Rebuttal.*

The deceased may be shown to have had no motive for suicide and to have been in a cheerful frame of mind. *State v. Cole*, 94 N. C. 958.

To show that the deceased may have taken the poison causing her death medicinally, the fact that she took arsenic as a medicine ten years previously is too remote. *Goersen v. Com.*, 106 Pa. 477, 51 Am. Rep. 534.

*The Molineux Case.*

One of the most celebrated of poisoning cases of modern times was the case of the People *v.* Molineux, 168 N. Y. 264, and although it is not of so much value touching upon the proof of the *corpus delicti*, yet its circumstances are well worth relating at this point. It aroused an unusual amount of interest, and its circumstances can scarcely be paralleled in criminal annals.

The defendant, Roland B. Molineux, and one Harry S. Cornish were both members of the Knickerbocker Athletic Club in New York City. On December 24, 1898, Cornish received through the mail a box containing a silver bottle holder and a blue bottle bearing a "bromo seltzer" label and filled with what purported to be "bromo seltzer" powder. It came apparently as a Christmas gift from a friend. With the bottle was enclosed a small Tiffany card envelope, not, however, containing the donor's card. Cornish supposed the friend had forgotten the card, so he reclaimed the wrapping paper from the waste-basket and preserved the written address to discover from it if possible the identity of the sender. The "bromo seltzer" he took to his home, which was also the home of Mrs. Katharine J. Adams and her daughter. A day or two later, Mrs. Adams was seized with a headache and her daughter asked Cornish for some of his "bromo seltzer." He prepared a dose for her himself, and she drank most of it, remarking its peculiar taste. Cornish himself thereupon drank a small portion of what remained. In a very short time Mrs. Adams was dead and Mr. Cornish was sick, vomiting and in distress.

Expert chemists analyzed the contents of the "bromo seltzer" bottle, the sediment of the glass from which Mrs. Adams drank, and the organs of Mrs. Adams' body, in all of which was found a deadly poison known as cyanide of mercury. The cause of the death was therefore beyond dispute.

In order to show that this poison was sent with criminal intent and was sent by the defendant, the following evidence was produced:

Molineux and Cornish had had a serious personal disagreement, each accusing the other with much bitterness. Molineux made several futile efforts to get Cornish dismissed from the Knickerbocker Club, finally threatening to resign from the club if Cornish

were not dismissed. This threat he carried out. It was not long after till Cornish received the "bromo seltzer."

Molineux was thirty-one years of age, well educated, and an expert chemist. He was superintendent in the business of Morris Hermann and Co., manufacturers of dry colors, in Newark, N. J. He himself possessed a chemical laboratory in which were found a great variety of chemicals and poisons, from which cyanide of mercury could easily be produced. Thus it was shown that the defendant had the requisite skill and materials with which to commit the crime charged.

It appeared that the silver bottle holder received with the "bromo seltzer" had been purchased at a store in Newark, near the factory of Hermann and Co., on December 21, and the defendant was seen near that store on that day, although the clerk swore that the bottle holder was not sold directly to Molineux. The box and the card envelope were both from Tiffany's, and the defendant had an account there, having made recent purchases. The poison package was mailed at the general post-office on December 23, at an hour when the defendant was usually passing through that vicinity.

The fact of the existing trouble between Cornish and Molineux caused suspicion to be directed toward the latter as the sender of the poison; but the immediate occasion for his arrest was as follows: As a news item of interest the "New York Herald" had published a *fac simile* of the address upon the poison package. This was seen by two officials of the Knickerbocker Club, and they at once compared it with the letters of Molineux addressed to the Club in relation to the Cornish trouble. They were at once convinced that the handwriting was the same. Having this much evidence as a basis, the police placed Molineux under arrest, and he was indicted for the murder of Mrs. Adams.

At the trial the two Club officials referred to, and one other lay witness acquainted with Molineux's handwriting, testified to their belief that the poison package address was in his handwriting. In addition, nine men who were handwriting experts by profession, and five other experts who held positions in banks, were all agreed and testified in Court that the poison package address was in Molineux's handwriting. To arrive at this conclusion they were allowed to use as standards of comparison the various writings described in the note on this case after Chapter IV herein.

At the first trial of this case, the prosecution introduced certain evidence to show that about one month previously Molineux had murdered one H. C. Barnet by similar means. Barnet and Molineux were friends, but were also rivals for the affection of one Miss Cheeseborough. At first she had favored Molineux's suit, but on becoming acquainted with Barnet, transferred her affections to him. Shortly thereafter, on October 28, 1898, Barnet was taken sick, and on November 10th he died. The physicians did not suspect poison, although Barnet told them that he had received a box of "Kutnow" powder through the mails, and said that the cause of his trouble was a dose of that powder that he had taken.

Later an analysis was made of the remainder of the "Kutnow" powder, and it was found to contain cyanide of mercury. A search was made for the wrapper, but none was found. In February, 1899, the body of Barnet was exhumed, and an analysis made showing the presence of cyanide of mercury. Experts testify that this had been the cause of his death.

During Barnet's illness, the defendant procured flowers for Miss Cheeseborough to send him. Nineteen days after Barnet's death, the defendant and Miss Cheeseborough were married.

The further remarkable conduct on the part of the defendant was proved in Court. Some months before Barnet's death, the defendant rented Box 217 in a private letter-box system at 257 W. 42d Street, not in his own name, but in the name H. C. Barnet. In this name, and through this box, he conducted a correspondence with various medical and chemical firms, mostly firms dealing in remedies for impotence. "Kutnow" powder was one of these remedies. To show that Molineux was the real party conducting this correspondence, the keeper of the letter-box system testified that he was the man, and there was further introduced a certain "diagnosis blank" sent to Box 217 by one of the medical firms and filled out at their request by the correspondent. This blank was filled out by a description of the correspondent, describing himself as single, contemplating marriage, thirty-one years old, chest thirty-seven inches, waist thirty-two inches, family consumptive, business sedentary, complexion "yellowish," and seeking treatment for impotency. This in no respect described the real H. C. Barnet, but was a correct description of the defend-

ant. This blank and the letters written in Barnet's name were introduced in evidence to fasten the Barnet murder upon the defendant, and inferentially the Adams murder, and these writings were used also as standards with which to compare the poison package address.

Further still, to complete the entanglement of the defendant in the circumstantial evidence net, evidence was given to show that on Dec. 21, 1898, the defendant, though not in person, had rented a box in another private letter-box agency at 1620 Broadway, this time in the name H. Cornish. Through this, a correspondence similar to that in the name of Barnet was conducted, and here, too, a package of "Kutnow" powder was received, but never delivered to the defendant. A number of the letters written in this correspondence, and signed H. Cornish, were on a peculiar egg-blue paper with a certain emblem like other paper that Molineux was shown to have had and used. These letters also were used for comparison as well as to connect the defendant with the crime charged.

The defendant was convicted of the murder of Mrs. Adams, but on appeal to the Court of Appeals of New York, he obtained a new trial. The Court held unanimously that the statements of Barnet to his doctor to the effect that he had received the "Kutnow" powder through the mails was purely hearsay and inadmissible.

Four out of seven judges also held that the evidence to show that Molineux murdered H. C. Barnet was not admissible for the purpose of proving him guilty of murdering Mrs. Adams. Evidence of other crimes is generally not admissible, and there are only five exceptions to the general rule. Proof of other crimes may be made to show: "(1) Motive; (2) Intent; (3) The absence of mistake or accident; (4) A common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) The identity of the person charged with the commission of the crime on trial." The majority of the Court held that the Barnet evidence did not fall within any of the five exceptions.

There should be read on this point, however, the able dissenting opinion of Parker, C.J., with whom concurred two other judges. In their opinion any evidence is admissible, so far as this rule is

concerned, which tends to show that the defendant committed the crime charged, and that if it does so tend it is immaterial that it also tends to show that the defendant committed another crime. They further believe that the Barnet evidence does so tend and is admissible. They further contend that even though the five exceptions laid down by the majority are the correct limitations of the rule, the Barnet evidence ought to be admitted under exception five. Their argument on this point is very convincing.

At the new trial, presumably without the Barnet evidence, Mr. Molineux was acquitted, after having spent several years in the penitentiary under death sentence.

*Possession of Poison by Defendant.*

The defendants, a man and a woman, were charged with attempting to poison the man's wife. It was shown that they had purchased chloroform and croton oil, though they denied it and swore they did n't know the druggist.

The wife testified that after taking medicines given her by her husband and after eating food prepared by the woman she had had certain symptoms shown to be symptoms of poisoning by croton oil. After eating food at the same time, the man had complained of the same symptoms as his wife, but a note was in evidence written by the woman defendant to the man, telling him that his wife had complained of the food and that he must do the same. The husband had left home telling his wife that he would not be back for some time, but he approached his wife's bed that night with a handkerchief saturated with chloroform.

The defendants were convicted. *Com. v. Boatwright* (Pa.), 2 *Lanc. Law Rev.* 293.

Where defendant was charged with attempt to murder, it was shown that he had mixed something that he called "Rough on Rats" with meal belonging to A, that he had previously asked a boy to mix the two, saying that he wished to kill A, that A and his family ate of the meal and were made very sick, and that a chicken fed on the meal died, and it was held that the evidence was not sufficient to show that the mixture was poison. *Osborne v. State*, 64 *Miss.* 318.

*Sufficiency of Evidence to Connect the Defendant with the  
Poisoning.*

Where one died of arsenical poisoning, the defendant was shown to have had illicit relations with the deceased's wife, to have had quarrels with the deceased, and to have purchased rat poison. The defendant and the wife of the deceased had put up certain canned fruit and the wife was shown to have said that a certain can of it contained poison. A jar not shown to be like the fruit jars was found in the house with particles of arsenic in it. It was not shown that the contents of that jar were given to the deceased, or that the defendant put poison into any jar or gave any fruit to the deceased, and a conviction was set aside. *State v. Bertoch* (Iowa), 83 N. W. 967.

In *Com. v. Robinson*, 146 Mass. 571, the defendant was charged with the murder of her brother-in-law Freeman, by poison. It was shown that Freeman, a married man with a wife and two children, had insured his life for \$2,000 in favor of his wife, Annie Freeman. The defendant, a sister of Annie Freeman, was hard pressed for the payment of debts, and had no money with which to pay. She thereupon formed the plan of procuring this insurance money, by first killing her sister, then inducing Freeman to make her the beneficiary of his insurance policy, and finally killing him. This plan she carried out. Annie Freeman died February 26; on May 13 following, the defendant was made the insurance beneficiary; on June 27, Freeman died; and on September 23 the defendant's debts were paid from the insurance money.

In *State v. Smith*, 102 Iowa, 656, it was proved that the deceased was insured for \$3,000 in favor of the defendant, his wife; that she had constant improper relations with another man whom she had set up in the saloon business with money saved by her husband and had said she intended to go away with this man as soon as she received the insurance money; that about a year before his death, while alone with the defendant, the deceased had been shot through the head and totally blinded; that the defendant had treated her husband brutally, and had made several previous attempts to poison him; that she had told a witness that she had given something to the deceased, and not to send for a doctor if he became ill; that later she filled a capsule with "Rough on Rats"

and gave it to her husband, and when her paramour started for a doctor, she called him back, and no doctor was called. A post-mortem examination showed that the death was due to arsenic; and the preparation called "Rough on Rats" was proved to be mostly arsenic. This evidence was certainly sufficient to sustain a conviction, but the verdict was set aside because of errors below, not affecting the admissibility of the above evidence.

In *State v. Cole*, 94 N. C. 958, the following evidence was admitted and held to be sufficient to convict the defendant of wife murder. The wife was shown to have been in good health and spirits shortly before her death, and was alone with her husband when she died. After death, her body was drawn up and her jaw fallen. The defendant then told witnesses that he had given her a dose of liver regulator. He had previously told one witness that he had plenty of strychnine. He also detailed to witnesses an account of a previous similar attack sustained by his wife eleven years before. The attending physician at that former time was allowed to testify that previously thereto he had let the defendant have strychnia "to bait crows," and that in his opinion the woman's attack was caused by strychnia.

The body of the deceased was exhumed several months after burial, the stomach removed and turned over to a chemist, who reported that it contained strychnia and that strychnia was the cause of death.

After his wife's death the defendant was shown to have given away a bottle of strychnia.

Here the symptoms related by the defendant, the chemist's examination, the possession of poison by the accused, his opportunity to give it, and his suspicious conduct all pointed to the conclusion that death was due to poison administered by him.

#### *Infanticide Cases.*

*Proof of Corpus Delicti.* —The *corpus delicti* was not sufficiently established by the confession of the mother that her child was born alive and that she put it in a certain spring, when the body was not found in the spring and death by drowning was not proved. *Harris v. State*, 28 Tex. App. 308, 19 Am. St. Rep. 837.

*Infant Must Have Been Born Alive.*

It must be proved that the child was born alive and that it had a complete and separate existence of its own. *State v. McKee*, 1 Add. (Pa.) 1; *Com. v. O'Donohue*, 8 Phila. 623.

Where the only evidence that the child was born alive is the opinion of a physician and the mother testifies it was born dead, the evidence is not sufficient to convict. *In re Davis* (N. Y.), 3 City H. Rec. 45.

Where no violence is shown and it is not proved that the child was born alive, flight of the mother and concealment of the birth are not sufficient to prove crime. *Sheppard v. State*, 17 Tex. App. 74.

A mother was convicted of murder on the following evidence: a dead child was found in a dry well near by, the defendant had shortly before showed signs of pregnancy, and no other woman near by had, her bed-clothing was bloody, she had been seen washing bloody clothes, and would not say whose. *Echols v. State*, 81 Ga. 696.

To prove an infanticide, a non-expert who had seen the body was allowed to say that he thought it fully developed. *Hubbard v. State*, 72 Ala. 164.

*Cause of Death.*

Where a woman in labor went into a thicket and later a newly born child was found dead with bruises on the head and hips, lying in a gully partly filled with water, a conviction was sustained. *Peters v. State*, 67 Ga. 29.

In *Warren v. State*, 30 Tex. App. 57, the defendant, the father of the child, who had married its mother only a month before its birth, took the child away in a buggy one night, and later its body was found under a bush. It was shown, however, that the child was born at seven months and was very puny, that it was gasping when given to him by his wife's mother, and that it bore no marks of violence. A conviction for murder was set aside.

A new-born infant was found out of doors and returned to the mother. The next day it died, and the death might have been due to exposure or to smothering. The cause of death was not sufficiently shown. *Lee v. State*, 76 Ga. 498.

In *Com. v. Harman*, 4 Pa. 269, the accused was convicted of murdering her infant child nine months old. She took the child away at 6 A. M. and came back at 9 A. M., saying that she had given it away. She had been seen with a shovel, in the meantime, going toward a stream. The body was discovered buried there, the clothing damp, and the general appearance indicating death by drowning.

*Sufficiency of Proof of Defendant's Guilt.*

The defendant, father of an illegitimate infant, was convicted of murdering it on the following evidence: The mother testified that defendant took the child when they were out riding together and came back in half an hour saying he had left it with a family, — a story shown to be false, while the body was found in a river near by and identified. *Warren v. State* (Tex.), 26 S. W. 403.

In *Re Gardner*, 5 City H. Rec. (N. Y.) 70, the defendant was acquitted of the murder of her infant, although she had concealed its birth, and it was found dead with a fractured skull in a closet to which the mother (defendant) had the key.

Where the mother of the child testified that she placed it in the cistern, where the body was found, immediately after its birth and with no one's knowledge, it was held that there was not enough evidence to convict the father of the crime, though he had occupied the same room with the mother, had objected to any examination by physicians, and denied all knowledge of the woman's confinement, and the infant was found with a string tightly wound about its neck. *Josef v. State*, 34 Tex. Cr. Rep. 446, 30 S. W. 1067.

The defendant was the father of an illegitimate infant and was charged with its murder. Its mother had left the child with him in a buggy and he had driven away and returned without it. Two weeks later the child's body was found well preserved, but with wounds on it. An infant's dress was found in the manger of the horses he had driven. Expert evidence was introduced to show that the body could have been dead all of the two weeks without decomposition. The defendant was convicted. *State v. Cunningham* (Iowa), 82 N. W. 775.

In *Johnson v. State* (Tex.), 24 S. W. 285, where defendant was charged with murdering his daughter's child begotten by him, and his defence was that she had never been pregnant, the testimony of the daughter, a doctor, and a mid-wife was sufficient to overcome that of the defendant, his wife, and his son.

## CHAPTER VIII.

OF THE FORCE AND EFFECT OF CIRCUMSTANTIAL  
EVIDENCE.—CONCLUSION.

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SECTION I.GENERAL GROUNDS OF THE FORCE OF CIRCUM-  
STANTIAL EVIDENCE.

IN considering the force and effect of circumstantial evidence, the credibility of the *testimony*, as distinguished from the credibility of the *fact*, is assumed, since it is a quality essential to the value of circumstantial, in common with all moral, evidence.

Our faith in moral evidence is grounded, as we have seen, upon our confidence in the permanence of the order of nature, and in the reality and fidelity of the impressions received by means of the senses which connect us with the external world and with other men; and upon the laws of our moral and intellectual being, the immutability of moral distinctions, and the authority of conscience (*a*); so that if we could correctly estimate, and were able to eliminate, the various disturbing

(*a*) See Ch. i., section 3, p. 5, *supra*.

influences which tend to divert men from the path of truth and rectitude, our reasonings and conclusions would possess all the force of demonstration.

The silent workings, and still more the explosions, of human passion which bring to light the darker elements of man's nature, present to the philosophical observer considerations of intrinsic interest; while to the jurist, the study of human nature and human character with its infinite varieties, especially as affecting the connection between motive and action, between irregular desire or evil disposition and crime itself, is equally indispensable and difficult. No department of inquiry demands more constant watchfulness or more habitual and patient care and thought.

The distinct and specific proving power of circumstantial evidence, as incidentally stated in a former part of this Essay, depends upon its incompatibility with any reasonable hypothesis other than that of the truth of the principal fact in proof of which it is adduced (*b*); so that, after the exhaustion of every other mode of solution, we must either conclude that the accused has been guilty of the fact imputed, or renounce as illusory the results of consciousness and experience, and such knowledge as we possess of the workings of the human mind (*c*).

Conclusions thus formed are simple inferences of the understanding, aided and corrected by the appli-

(*b*) See Ch. ii., section 3, p. 34, *supra*. See also Rule 4, p. 262, *supra*.

(*c*) *Traité de la Preuve*, par Mittermaier, ch. 59.

cation of those rules of evidence and those processes of reason which sound and well-ripened experience has consecrated as the best methods of arriving at truth ; and they constitute that MORAL CERTAINTY upon which men securely act in other great and important concerns, and upon which they may therefore safely rely for the truth and correctness of their conclusions in regard to those events which fall within the province of criminal jurisprudence.

Many continental codes, following the principles of the civil law, prescribe imperative *formula* descriptive of the kind and amount of evidence requisite to constitute legal proof. Those principles formerly prevailed in the reception of evidence in the Ecclesiastical and in the Admiralty Courts (*d*) in this country, so far as to require the testimony of a plurality of witnesses ; but such a restriction has long ceased to be in force. The diversities of individual men render it impracticable thus definitely to estimate the infinite combinations of human motives and actions ; or to fix, with arithmetical exactness, standards of proof which shall operate with unvarying force upon the minds of all men. Such arbitrary rules are not merely harmless, nor simply superfluous ; they are often dangerous to the cause of truth ; they operate as fetters on the conscience of the Judge, obliging him occasionally to determine contrary to his own convictions of truth ; are unnecessary for the protection of the innocent, and effective only for the impunity of the guilty (*e*).

(*d*) See the preamble to 28 Hen. viii. c. 15.

(*e*) *Traité de la Preuve*, par Mittermaier, ch. 8. Cf. pp. 29-31, *supra*.

A learned Judge of one of our ecclesiastical courts, after commenting on the ancient but now obsolete rule of those courts, that one witness is not sufficient to establish the fact of adultery, said, "To this authority I readily submit, and I am bound to do so; but I must honestly say that I do it upon compulsion. I am bound by this rule, and so long as it remains a rule of these courts, so long as more evidence is required to prove an act of adultery than to find a man guilty of murder, it will be my duty to obey that rule" (*f*).

The very few cases in which the law of England requires a particular amount of evidence, as on trials for high treason, where two witnesses are required, and in cases of perjury, where there must be two witnesses, or the testimony of one witness confirmed in some material particular by independent evidence, are grounded upon different principles; in the former, upon motives of policy, for the protection of persons charged with political crime from becoming the victims of party violence; and in the latter, because mere contradiction by the oath of a single witness has never been considered as of itself sufficient to prove that the accused has been guilty of wilful falsehood, and the old rule has not been altered by Act of Parliament.

Since the Criminal Evidence Act, 1898, the same reasoning applies in all cases where the prisoner gives evidence on his own behalf, but has special

(*f*) *Per* Dr. Lushington, in *Taylor v. Taylor*, 6 Eccl. & Mar. Cases, at p. 563.

force in cases where there is a peculiar risk of false evidence, notably in charges of assaults upon women and children and kindred offences. Female chastity is so highly prized, and is of such social importance, that there is often very great temptation to a woman to screen herself by making a false or exaggerated charge, and supporting it with minute details of evidence of a kind, which the female mind seems peculiarly adapted to invent. Unless, therefore, the story of the prosecutrix is corroborated, it becomes a mere question of oath against oath, and although the law does not in these cases technically require corroborative evidence, except in certain cases under the Criminal Law Amendment Act (*g*), judges are in the habit of telling juries that it is not safe to convict the prisoner upon the unsupported statements of the woman or child. In the case of charges by children, there is the additional difficulty that they are constantly too young and too ignorant to have the least appreciation of the gravity of the charge made, and very often to have any moral idea at all; and it is frequently impossible to apply to their stories the tests by which, to some extent, the

(*g*) 48 & 49 Vict. c. 69, ss. 2, 3, and 4. Corroborative evidence is also required in affiliation proceedings (8 Vict. c. 10, s. 6; and 35 & 36 Vict. c. 65, s. 4) and under section 15 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), as well as in actions for breach of promise of marriage. Such actions were, by s. 2, excepted from 14 & 15 Vict. c. 92 which made plaintiffs and defendants in civil suits competent witnesses. The disability of the parties to an action for breach of promise of marriage to give evidence, was removed by 32 & 33 Vict. c. 68, s. 2; but the condition was imposed that the evidence of the plaintiff must be corroborated in some material particular.

falsehoods and exaggerations of grown-up persons can be detected, or to tell how far they are relating what happened, or what has been drilled into them by parents or friends.

Upon an analogous principle, the evidence of an accomplice requires corroboration. It has been often said that this is not a rule of law, but that it is, nevertheless, the duty of the Judge to insist with juries that they ought not to convict upon the unsupported testimony of an accomplice. To the Editor it has always seemed that if it is the duty of the Judge to tell the jury that they ought not to convict under such circumstances, it should be the duty of the jury to follow what the Judge ought to tell them. He acted upon this view at the Central Criminal Court in an important case (*h*) in which he withdrew from the jury one of the counts in an indictment upon which there was very clear and unshaken evidence by the accomplice, but nothing else; and he is informed by Sir Arthur Charles that, in a case tried at Winchester, in which he was, when at the bar, counsel for the prosecution, Mr. Baron Bramwell ruled in the same way, and upon the same grounds; and, refusing to leave the case to the jury, directed an acquittal where there was no corroboration of the accomplice.

If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in ques-

(*h*) *Reg. v. Wilde*, C. C. C., May 1895. The ruling was at the close of the case for the prosecution, and on May 23.

tion—that he had so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime—that he has possessed the requisite means and opportunities of effecting the object of his wishes—that recently after the commission of the act he has become possessed of the fruits or other consequential advantages of the crime—if he be connected with the *corpus delicti* by any conclusive mechanical circumstances, as by the impressions of his footsteps, or the discovery of any article of his apparel or property at or near the scene of the crime—if there be relevant appearances of suspicion connected with his conduct, person, or dress, and such as he might reasonably be presumed to be able, if innocent, to account for, but which, nevertheless, he cannot or will not explain—if, being put upon his defence *recently* after the crime, under strong circumstances of adverse presumption, he cannot show where he was at the time of its commission—if he attempt to evade the force of those circumstances of presumption by false or incredible pretences, or by endeavours to evade or pervert the course of justice—the concurrence of all or of many of these cogent circumstances, inconsistent with the supposition of his innocence and unopposed by facts leading to a counter-presumption, naturally, reasonably, and satisfactorily establishes the moral certainty of his guilt; if not with the same kind of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case and the vast majority of human transactions admit. In such circumstances we are

justly warranted in adopting, without reserve, the conclusions to which the mind is naturally conducted "by a broad, general, and comprehensive view of the facts, and not relying upon minute circumstances with respect to which there may be some source of error" (*i*), and in regarding the application of the sanctions of penal law as a mere corollary.

Nor can any practice be more absurd and unjust than that perpetuated in some modern codes, which, while they admit of proof by circumstantial evidence, inconsistently deny to it its logical and ordinary consequences. Thus the penal code of Austria (*k*) prohibits the application of capital punishment to the crime of murder, "où l'inculpé n'est convaincu que par le concours des circonstances"; but nevertheless the party may be sentenced to an imprisonment of twenty years; and the same indefensible practice prevails in many other States, though with a considerable diversity as to the maximum penalty (*l*). How wise and just the emphatic condemnation of the French Papinian: "Ut veritas, ita probatio, scindi non potest: quæ non est plena veritas est plena falsitas, non semiveritas; sic, quæ non est plena probatio, plane nulla probatio est" (*m*).

(*i*) *Per* Pollock, L.C.B., in *Reg. v. Manning and Wife*, see pp. 265 and 269, *supra*.

(*k*) Première partie, art. 430.

(*l*) See note, p. 32, *supra*, and Mittermaier, *Traité de la Preuve*, c. 61.

(*m*) Cujas, *Cod. t. de Leg.*, and see Gabriel, 67.

## SECTION 2.

## CONSIDERATIONS WHICH AUGMENT THE FORCE OF CIRCUMSTANTIAL EVIDENCE IN PARTICULAR CASES.

SUCH are the considerations which constitute the force and effect of circumstantial evidence in *general*; but there are some collateral considerations which augment the force of circumstantial evidence in *particular* cases, and greatly increase the strength and security of our convictions, upon which it will be expedient to enlarge.

(1.) The most important of these auxiliary considerations arises from the concurrence of many or of several separate and independent circumstances pointing to the same conclusion, especially if they be deposed to by unconnected witnesses. In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes, and the more secure becomes our conviction of the moral certainty of the fact they are alleged to prove, as the intensity of light is increased by the concentration of a number of rays to a common focus. It is forcibly remarked by a learned writer (*n*), that “the more numerous are the particular analogies, the greater is the force of the general analogy resulting from the fuller induction of facts, not only from the mere accession of particulars, but from the additional strength which each particular derives by

(*n*) Bishop Hampden.

being surveyed jointly with other particulars, as one among the correlative parts of a system." Although neither the combined effect of the evidence, nor any of its constituent elements, admits of numerical computation, yet with the number of independent circumstances and witnesses, its cogency increases according to a geometrical rather than an arithmetical progression. The effect of a body of circumstantial evidence is sometimes compared to that of a chain, but the metaphor is inaccurate, since the weakest part of a chain is also its strongest. Such evidence is more aptly to be compared to a rope made up of many strands twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose (*o*). These remarks are applicable with especial force to the written enumeration of a number of minute facts "multiplying beyond calculation the means of detecting imposture; serving the purpose of an accuser by hints and allusions only, such as would be found in genuine correspondence, not by those clear and positive manifestations of guilt by which an eager partisan betrays his forgeries" (*p*).

The increase of force produced by the concurrence of independent *circumstances* is analogous to that which is the result of the concurrence of several independent *witnesses* in relating the same fact; and if these elements admitted of numerical valuation,

(*o*) Reid's *Essays on the Intellectual Powers*, Essay vii. c. iii.

(*p*) Sir James Mackintosh.

it has been said that their combined effect would be capable of being represented by a fraction, having for its numerator the product of the chances favourable to the testimony of each witness, and for its denominator, the sum of all the chances, favourable and unfavourable, the unfavourable chances being the product of the several deficiencies of the witnesses. Whether the supposed composition of the numerator and denominator is mathematically accurate may be open to question, but the chances would certainly be represented by some such fraction. If, however, in such case the witnesses be dependent on each other, so that the testimony of the second depends for its truth upon that of the first, that of the third upon that of the second, and so on, then the effect of the evidence diminishes with every increase in the number of the witnesses or the facts, just as an increase in the denominator of a fraction reduces it to one of inferior value (*q*).

A learned writer has illustrated the subject by a case which at first sight seems an extreme one, and it has occasionally been pressed in argument with much force (*r*). "Let it be supposed," says he, "that A. is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns, and that a person apprehended in the same fair or market where the robbery takes place is found in possession of the same

(*q*) 2 Kirwan's Logic, c. vii. Hartley's Obs. c. iii. s. 2, prop. LXXX.

(*r*) See the trial of the *Rev. Ephraim Avery*, charged with the murder of Sarah Maria Cornell, before the Supreme Court of Rhode Island, May, 1833. (Boston.)

remarkable combination of coin and of no other, but that no part of the coin can be identified ; and that no circumstances operate against the prisoner except his possession of the same combination of coin : here, notwithstanding the very extraordinary coincidence as to the number of each individual kind of coin, although the circumstances raise a high probability of identity, yet it still is one of an indefinite and inconclusive nature " (s). The probability that the coins lost and those discovered are the same is so great, that perhaps the first impulse of every person unaccustomed to this kind of reasoning is to conclude that they certainly are so ; yet, nevertheless, the case is one of probability only, the degree of which is more or less capable of exact calculation ; but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would and that which would not justify the infliction of penal retribution in other cases of inferior probability. In the case of a small number of coins, two or three for instance, the probability of their identity would be very weak ; and yet the two cases, though different in degree, are in principle the same ; and the chance of identity is in both cases capable to some extent of precise determination. The learned writer adds, that "although the fact taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of

(s) Starkie's Law of Evidence (Ed. 1853), p. 854.

the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury." In like manner it would be difficult to resist the inference of the identity of the coins, if in the case supposed they were scarce or foreign ones.

Few facts, however, are absolute or free from qualifying circumstances ; still fewer are capable of numerical estimation. The veracity of witnesses also is generally open to question, and the cases to which this kind of reasoning is applicable, if any such there be, must be very rare. Every attempt to apply such estimation to the combination of facts and probabilities would give a product affected by the same sources of error and uncertainty, as affect its separate elements ; and in all judgments grounded upon circumstantial evidence, this fundamental difference between moral and mathematical certainty must be borne in mind. "It were absurd," declares a philosophical writer, "to say that the sentiment of belief produced by any probability is proportioned to the fraction which expresses that probability ; but it is so related to it, or ought to be so, as to increase when it increases, and to diminish when it diminishes" (*t*). It is manifest, however, that the effect of the concurrence of many witnesses, and the conjunction of many separate circumstances, is to add greatly to the force of each ; and if the credit of the witnesses be unimpeachable, and the hypotheses of confederacy and error be excluded, they may lead to an irresistible conviction that the facts

to which they relate are true. The case suggested is that of circumstantial evidence in its most cogent form; and in such case the conclusion to which its various elements converge must often be regarded as morally certain.

(2.) Apart from the direct effect of that probability which results from a concurrence of independent witnesses or circumstances, the security of our judgments is further increased by the considerations that, in proportion to the number of such witnesses or circumstances, confederacy is rendered more difficult, and that increased opportunities and facilities are afforded of contradicting some or all of the alleged facts if they be not true. To preserve consistency in a work even professedly of fiction, where all the writer's art and attention are perpetually exerted to avoid the smallest appearance of discrepancy, is an undertaking of no common difficulty: and it is obvious that the difficulty must be still greater of preserving coherency and order in a fabricated case which must be supported by the confederacy of several persons, where even a slight variation in any of the minute circumstances of the transaction or of its concomitants may lead to detection and exposure. On the other hand, though, if the main features of the case do not satisfactorily establish guilt, it is not safe to rely upon very minute circumstances (*u*), yet, if the statements of the witnesses are based upon realities, the more rigorously they are sifted the more satisfactory will be the general result, from the development of minute

(*u*) *Per Rolfe, B., in Reg. v. Rush, Norfolk Spring Ass. 1849.*

indirect, and unexpected coincidences in the attendant minor particulars of the main event (*x*). It was happily remarked by Dr. Paley, that "the *undesignedness* of the agreements (which undesignedness is gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist, to the places in which those circumstances occur, and the circuitous references by which they are traced out) demonstrates that they have not been produced by meditation or by any fraudulent contrivance. But coincidences from which these causes are excluded, and which are too numerous and close to be accounted for by accidental concurrences of fiction, must necessarily have truth for their foundation" (*y*). The same writer also justly remarks, that "no advertency is sufficient to guard against slips and contradictions when circumstances are multiplied" (*z*). Hence it is observed, in courts of justice, that witnesses who come to tell a concerted

(*x*) A remarkable illustration of the truth of this observation occurred within the Editor's experience. He had, in the year 1889, to try at Taunton Assizes a young man named Reyland for murder. After a careful study of the depositions, and a visit to the spot where the murder was committed and the various localities mentioned by the witnesses, he came to the conclusion that it was impossible then to form any opinion as to the guilt or innocence of the prisoner, and that the solution of that question would depend upon a great number of small incidents and facts which had not so far been investigated, but which must be carefully inquired into. If the prisoner was innocent he felt confident the new facts would be in his favour; if not, they would be against him. In every single instance the new matter elicited was unfavourable to the prisoner. He was convicted and executed, having fully confessed his guilt. See also p. 176, *supra*.

(*y*) Paley's Evid., P. ii. c. vii.; compare Whately's Rhet. p. i. c. ii. s. 4; Greenleaf's Law of Evidence, P. I. ch. 3, sections 13 & 13a.

(*z*) Horæ Paulinæ, c. i.

story are always reluctant to enter into particulars, and perpetually resort to shifts and evasions to gain time for deliberation and arrangement, before they reply directly to a course of examination likely to bring discredit upon their testimony.

It must nevertheless be admitted that history and experience supply abundant evidence that it would be most erroneous in the abstract to decide a matter of fact by the numbers of either witnesses or incidents, and that there have been extraordinary cases of false charges, most artfully and plausibly supported by connected trains of feigned circumstances.

But considering the circumstances of the class of persons liable to be accused of crime—their deprivation of personal freedom—their usual lack of friends, of money, and professional aid—their imperfect knowledge of the facts proposed to be proved—their frequent inability to understand how the facts bear upon the question of their guilt or innocence—the alleged facility of disproof is often more imaginary than real. Lord Eldon thus forcibly expressed himself on this question: “I have frequently thought that more effect has been given, than ought to have been given, in what is called the summing-up of a Judge on a trial, to the fact, that there has not been the contradiction on the part of the defence which it is supposed the witnesses for the accusation might have received. . . . It may often happen that, in the course of a trial, circumstances are proved which have no bearing on the real question at issue; and

it may also happen, that facts are alleged and sworn to by witnesses which it is impossible for the accused party to contradict ; circumstances may be stated by witnesses which are untrue ; yet they may not be contradicted, because the party injured by them, not expecting that that which never had any existence would be attempted to be proved, cannot be prepared with opposing witnesses. So, also, in cases in which an individual witness speaks to occurrences at which no other person was present but himself. There it may be absolutely impossible to contradict him " (*a*).

Many of the disadvantages under which prisoners were placed in Lord Eldon's time have been removed or greatly diminished. They now have a *right* to require, upon payment of a reasonable sum, copies of the depositions upon which they were committed or held to bail (*b*) by a justice of the peace—also of any evidence called on their own behalf (*c*) ; and this right has been extended to the evidence given before the coroner in cases of committal upon a coroner's inquisition (*d*). An enforceable legal right to have copies of the evidence proposed to be given at the trial does not exist with regard to evidence discovered in the interval between the committal and the trial, or other additional evidence which the prosecution may wish to call ; nor where the indictment is found without previous committal. Copies of

(*a*) Hansard's Parl. Deb., New Series (1820), vol. iii. col. 1445.

(*b*) The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), following an earlier Act of Will. IV.

(*c*) 30 & 31 Vict. c. 35, s. 3.      (*d*) 50 & 51 Vict. c. 71, s. 18 (5).

all evidence of this character ought to be given to the prisoner, and it was always the subject of very strong comment where this was not done ; but it was decided that the court could not for that reason reject it (*e*). It is, however, within the competence of the Judge to express his opinion that the evidence ought not to be given (*f*) if he thinks its admission unfair ; such an intimation is always attended to, and there is at the present day seldom any foundation for complaint on this score. The provisions of the Vexatious Indictments Act, together with the opportunity every accused person now has of giving his own evidence on oath, and of affording a full explanation or contradiction of the evidence against him, practically save him from oppression, and his position, so far as knowledge of the evidence against him is concerned, is much better than that of a defendant in a civil cause, so that the argument founded on the absence of contradictory or explanatory evidence may in many cases, at all events, be now urged with more justice and effect than formerly. There are, however, cases which do not afford any facility of disproof ; where, even admitting the truth of the testimony, the supposed presumption of guilt is nothing more than a mistaken conclusion from facts which afford no warrant for the inference of guilt ; in such circumstances, to attempt disproof is to attempt to grapple with a shadow—to require it, to exact an impossibility (*g*).

(*e*) *Reg. v. Connor*, 1 Cox, C. C. 233 ; *Reg. v. Greenslade*, 11 Cox C. C. 412.

(*f*) See Archbold's Criminal Pleading, 22nd ed. p. 389.

(*g*) *Rex v. Looker*, pp. 242-244, *supra* ; *Rex v. Downing*, pp. 240-242, *supra* ; and *Rex v. Thornton*, pp. 244-249, *supra*. Most

(3.) The preceding considerations imply the necessity of consistency and general harmony in the testimony of the different witnesses. All human events must necessarily form a coherent whole ; and actual occurrences can never be mutually inconsistent. If one of two witnesses deposes that he saw an individual at London, and the other that he saw him at York at or near the same precise moment, the accounts are absolutely irreconcilable, and one or other of them must by design or by inadvertence be untrue. A diversity ought always to excite caution and a careful consideration of the capacity, situation, and disposition of the witnesses, and especially of the possibility of confusion from some mental emotion or defect. "We are frequently mistaken," said Lord Chief Baron Pollock, "even as to what we may suppose we see ; and still oftener are we mistaken as to that which we suppose we hear" (*h*). Lord Clarendon relates that, in the alarm created by the Fire of London, so terrified were men with their own apprehensions, that the inhabitants of a whole street ran away in a great tumult, upon the rumour that the French were marching at the other end of it (*i*). The same historian has given another anecdote relating to that great calamity, too instructive as applicable to this subject to be omitted. A servant of the Portuguese am-

prisoners, however, must still labour under many difficulties and disadvantages, some of which—such as ignorance and want of means—are practically irremediable. They can only be reduced to a minimum by that ceaseless watchfulness to which every criminal judge should strive to attain.

(*h*) In *Reg. v. Manning and Wife*, C. C. C., Oct. 1849.

(*i*) *Life and Continuation*, vol. iii. p. 91 (Oxford ed., 1827).

bassador was seized by the populace and pulled about, and very much ill-used, upon the accusation of a substantial citizen, who was ready to take his oath that he saw him put his hand in his pocket, and throw a fire-ball into a house, which immediately burst into flames. The foreigner, who could not speak English, heard these charges interpreted to him with amazement. Being asked what it was that he pulled out of his pocket, and what it was he threw into the house, he answered that he did not think he had put his hand into his pocket, but that he remembered very well that as he walked in the street he saw a piece of bread upon the ground, which he took up and laid upon a shelf in the next house, according to the custom of his country; which, observes a learned writer (*k*), was so strong, that the King of Portugal himself would have acted with the same scrupulous regard to general economy. Upon searching the house, the bread was found just within the door, upon a board as described; and the house on fire was two doors beyond it, the citizen having erroneously concluded it to be the same; "which," says Lord Clarendon, "was very natural in the fright that all men were in" (*l*).

But *variations* in the relations by different persons of the same transaction or event, in respect of unimportant circumstances, are not necessarily to be regarded as indicative of fraud or falsehood, provided there be substantial agreement in other respects. True strength of mind consists in not

(*k*) Wooddeson's Lect. on the Laws of England, vol. iii. p. 299.

(*l*) Life and Continuation, vol. iii. p. 87 (Oxford ed. 1827).

allowing the judgment, when founded upon convincing evidence, to be disturbed because there are immaterial discrepancies which cannot be reconciled. When the vast inherent differences in individuals with respect to natural faculties and acquired habits of accurate observation, faithful recollection, and precise narration, and the important influence of intellectual and moral culture, are duly considered, it will not be thought surprising that entire agreement is seldom found amongst a number of witnesses as to all the collateral incidents of the same principal event. Lord Ellenborough said that where there was a general accordance of all material circumstances the credit of the story as a whole was rather confirmed than weakened by minute diversities in the evidence; that such trivial discrepancies gave it the advantage which belongs to an artless and unartificial tale; and that minute variances exclude the idea of any uniform contrivance and design in the variation, for where it is an artful and prepared story the parties agree in the minutest facts as well as in the most important (*m*). "I know not," says Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. That is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick

(*m*) *Rex v. Lord Cochrane and others*, 1814, Shorthand Report by Gurney, p. 456. See p. 99, *supra*.

out apparent or real inconsistencies between them. These circumstances are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the Judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud" (*n*).

Instances of discrepancy as to the minor attendant circumstances of historical events are numberless. Lord Clarendon relates that the Marquis of Argyle was condemned to be *hanged*, and that the sentence was performed the *same day*. Burnet, Woodrow, and Echard, writers of good authority, who lived near the time, state that he was *beheaded*, though condemned to be hanged, and that the sentence was pronounced on Saturday and carried into effect on the Monday following (*o*). Charles II., after his flight from Worcester, has been variously stated to have embarked at Brighthelmstone, and at New Shoreham (*p*). Clarendon states that the royal standard was erected about six o'clock of the evening of the 25th of August, "a very stormy and tempestuous day"; whereas other contemporary historians variously state that it was erected on the 22nd and the 24th of that month (*q*). By some historians the death of the Parliamentary leader Pym is stated to have taken place in the month of

(*n*) Paley's Ev. P. iii. c. i. See Appendix, p. 424, *infra*.

(*o*) Compare Clarendon's Life and Continuation, vol. ii. p. 266 (Oxford ed., 1827), and Paley's Ev. P. iii. c. i.

(*p*) 6 Hist. of Reb. 541; Lingard's Hist. of Eng. vol. xi. c. l. p. 98.

(*q*) 3 Hist. of Reb. 190; Rushworth's Collection, part iii. vol. i. p. 783 (4th volume); Ludlow's Memoirs, p. 17.

May, 1643 (*r*); while by others it is said to have occurred in the following year. To come nearer to our own times, the author of a celebrated biographical memoir relates that, after the Rebellion of 1745, three lords were executed at Tower-hill; whereas it is well known that *two* only underwent that doom, the third, Lord Nithsdale, having by the devotion of his wife effected his escape the night before his intended execution (*s*). It is remarkable that contemporary and early writers have stated the lady in question to have been his mother. Such discrepancies never excite a serious doubt as to the truth of the principal facts with which they are connected, unless they can be traced to the operation of prejudice or some other sinister motive (*t*).

Still less are mere *omissions* to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached and unsuspected. Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with, and the attention so riveted to, a particular fact, as to withdraw attention

(*r*) Whitelock's Memorials, 69; 4 Hist. of Reb. 436; 7 Hume's Hist. 540, ed. 1818; Godwin's Hist. of the Commonwealth, vol. i. p. 16 and footnote.

(*s*) Coxe's Mem. of Walpole, vol. i. p. 73.

(*t*) See in 4 Clarendon's Hist. 436, a remarkable instance or historical dishonesty. He states that Pym died of a loathsome disease, *morbis pediculosus*, evidently with the design of propagating the notion that it was "a mark of divine vengeance" (7 Hume's Hist. 540); whereas he must have known that his corpse was exposed to public view for several days before it was interred, in confutation of this calumnious statement. (Ludlow's Memoirs, p. 35.)

from concomitant circumstances, or prevent it from taking note of what is passing. It has been justly remarked that, "upon general principles, affirmative is better than negative evidence. A person deposing to a fact, which he states he saw, must either speak truly, or must have invented his story, or it must have been sheer delusion. Not so with negative evidence; a fact may have taken place in the very sight of a person who may not have observed it; and if he did observe it, may have forgotten it" (*u*). The phenomenon called the Northern Lights not recorded to have been seen in the British Islands before the commencement of the last century (*x*). Negative evidence is therefore regarded as of little or no weight when opposed to affirmative evidence of credible persons. Sometimes, however, the non-relation of particular facts amounts to the *suppressio veri*, which in point of moral guilt may be equal to positive mendacity, and destructive of all claim to credit (*y*).

### SECTION 3.

#### CASES IN ILLUSTRATION OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

MANY remarkable cases of this nature have been given in the preceding pages, in exemplification of

(*u*) Sir Herbert Jenner, in *Chambers v. The Queen's Proctor*, 2 Curt. at p. 434.

(*x*) Whately's Introd. Less. on Christ. Ev. 45.

(*y*) Grafton, who was printer to Queen Elizabeth, in his *Chronicles*, published in 1562, in writing the history of King John, has made no mention of Magna Charta; perhaps he considered that his silence might be deemed complimentary to that arbitrary princess.

some specific doctrine or object ; to these will now be added, as an appropriate commentary upon the discussion of the scientific principles governing the reception and estimate of circumstantial evidence, some striking examples of the force of a cumulation of moral and mechanical facts.

(1.) In the autumn of 1786 a young woman, who lived with her parents in a remote district in Kirkcudbright, was one day left alone in the cottage, her parents having gone out to the harvest-field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in a shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide ; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. Upon the body being opened it appeared that the girl was some months gone with child ; and on examination of the ground about the cottage, footsteps were discovered of a person who had seemingly been running hastily from the cottage, by an indirect road through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person, in his haste and confusion, had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them ; they appeared

to be those of a person who must have worn shoes the soles of which had iron knobs or nails in them—a circumstance common in that part of the country—and had been newly mended. Along the track of the footsteps, and at certain intervals, drops of blood were discovered ; and on a stile or small gateway, near the cottage and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person, nor was it even suspected who might be the father of the child of which the girl was pregnant.

At the funeral a number of persons of both sexes attended, and the steward-depute thought it the fittest opportunity of discovering if possible the murderer ; conceiving rightly that, to avoid suspicion, whoever he was, he would not on that occasion be absent. With this view he called together after the interment the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off and measured ; and one of the shoes was found to resemble, pretty nearly, the impression of the footsteps near the cottage. The wearer of the shoe was the schoolmaster of the parish ; which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination, however, the shoe proved to be pointed at the toe, whereas the impression of the footstep was round at that part. The measurement of the rest went on, and after nearly the whole number had been gone through one shoe at length was found which corresponded

exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails.

William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work, a statement which his master and fellow-servants, who were present, confirmed. This confirmation so far relaxed suspicion that a warrant of commitment was not then granted ; but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was apprehended and lodged in gaol. Upon his examination he acknowledged that he was left-handed ; and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided ; but in the course of the inquiry it turned out that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day ; that he called at a smith's shop, under the pretence of wanting something, which it did not appear he had any occasion for ; and that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was committed (which corresponded with the time that Richardson was

absent from his fellow-servants) she saw a person exactly like him in dress and appearance running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the foot-steps had been traced.

His fellow-servants now recollected that in the forenoon of that day they were employed with Richardson in driving their master's carts ; and that when passing by a wood, which they named, he said that he must run to the smith's shop and would be back in a short time. He then left his cart under their charge ; they waited for him about half an hour (which one of the servants ascertained by having at the time looked at his watch), and remarked on his return that he had been longer absent than he said he would be, to which he replied that he stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle ; on which they asked where he had been. He said he had stepped into a marsh, the name of which he mentioned ; on which his fellow-servants remarked, " that he must have been either mad or drunk if he had stepped into that marsh, as there was a footpath which went along the side of it." It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day, which were found concealed in the thatch of the apartment

where he slept, and appeared to be much soiled, and to have some drops of blood on them. He accounted for the blood by saying, first, that his nose had been bleeding some days before; but it being observed that he had worn other stockings on that day, he said he had assisted in bleeding a horse; it was proved, however, that he had not done so, but had stood at such a distance that the blood could not have reached him. On examining the mud or sand upon the stockings, it was found to correspond precisely with that of the mire or puddle adjoining to the cottage, which was of a very particular kind, none other of the same kind being found in that neighbourhood. It then came out that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellect, and had on one occasion been seen with her in a wood, in circumstances that led to a suspicion that he had had improper intercourse with her; and on being taunted with having such connection with one of her condition, he seemed much ashamed and greatly hurt.

It was proved by the person who sat next to him when his shoes were being measured, that he trembled, and seemed much agitated; and that in the interval between that time and his being apprehended he had been advised to fly, but his answer was, "Where can I fly to?" On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said that some of the crew might have committed

the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighbourhood.

The prisoner was tried at Dumfries, in the spring of 1787, and the jury by a great plurality of voices found him guilty. Before his execution he confessed that he was the murderer; and said it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him, where the knife would be found with which he had perpetrated the murder; and it was found accordingly in the place he described, under a stone in a wall, with marks of blood upon it (z).

The casual discovery of circumstances which indicated the existence of a powerful motive to commit the deed—the facts, that it had been committed by a left-handed man, as the prisoner was (a circumstance which narrowed the range of inquiry) and that there was an interval of absence which afforded the prisoner the necessary opportunity of committing the crime; his false assertion that he had not been absent from his work on that day (contradicted as it was by witnesses who saw him on the way to and in the vicinity of the scene of the murder) amounting to an admission of the relevancy and weight of that circumstance if uncon-

(z) *Rex v. Richardson*, Burnett's Criminal Law of Scotland, p. 524. This case is also concisely stated in Lockhart's *Memoirs of the Life of Sir Walter Scott* (iv. 52, 2nd ed. 1839); and it supplied one of the most striking incidents in "Guy Mannering."

tradicted; the discovery of his footsteps near the spot; his agitation at the time of the measurement and comparison of his shoes with the impressions; the discovery of his secreted stockings, spotted with blood, and soiled with mire peculiar to the vicinity of the cottage; the scratches on his face; his various untrue statements—all these particulars combine to render this a most satisfactory case of conviction, and to exemplify the high degree of assurance which circumstantial evidence is capable of producing.

(2.) A man named Patch was tried for the murder of Mr. Isaac Blight, a ship-breaker, near Greenland Dock. Mr. Blight had taken the prisoner into his service in the year 1803. In July 1805, having become embarrassed in his circumstances he entered into a deed of composition with his creditors; and in consequence of the failure of this arrangement made a colourable transfer of his property to the prisoner. It was afterwards agreed between them, that Mr. Blight was to retire nominally from the business, which the prisoner was to manage; Blight was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250. Of this amount, £250 was paid in cash, and a draft, upon a person named Goom, was given for the remainder, which would become payable on the 16th of September; the prisoner representing that he had received the purchase-money of an estate and lent it to Goom. On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take

up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th of September.

On the 19th of September Mr. Blight went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford, and then went to London, and represented to the bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, wherefore they were not to present it. The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom, about eight o'clock on the same evening (the 19th), he sent out to procure some oysters for his supper. During her absence a gun or pistol ball was fired through the shutter of a parlour fronting a wharf beside the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated; and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball had entered the shutter, it must have been discharged by some person who was close to the shutter; and the river was so much below the level of the house, that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbours to remain in the house with him that night. On the following day he wrote to inform Mr. Blight of this transaction, stating his hope that the shot had

been accidental, that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him.

Mr. Blight returned home on the 23rd of September, having previously been to London to see his bankers on the subject of the £1,000 draft. Upon getting home, the draft became the subject of conversation, and Mr. Blight desired the prisoner to go to London and not to return without the money. Upon his return from London the prisoner and Mr. Blight spent the evening in the back parlour, a different one from that in which the family usually sat. About eight o'clock the prisoner went from the parlour into the kitchen, and asked the servant for a candle, complaining that he was disordered. The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house, which was enclosed by palisades, and through a gate over a wharf, in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a counting-house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the shot. The servant heard the privy-door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting, upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance, with his clothes in disorder. He evinced great apparent concern for Mr. Blight, who was mortally

wounded and died on the following day. From the state of the tide, and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them.

In consequence of this event Mrs. Blight returned home, and the prisoner, in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own. Suspicion soon fell upon the prisoner, and in his sleeping-room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy. The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings. It was supposed that, to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river. All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false. He attempted to tamper with the servant-girl as to her evidence before the coroner, and urged her to keep to one account; and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased, and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to his ownership of the soiled stockings, which however were clearly proved to be his, and for the soiled state of which he made no attempt to account. The prisoner suggested the existence of malicious feelings

in two persons with whom the deceased had been on ill terms ; but they had no motive for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance.

The prisoner's motive was to possess himself of the business and property of his benefactor ; and to all appearance his falsehoods and duplicity were on the point of being discovered. His apparent incaution on the evening of the murder could be accounted for after the preceding alarm by no other supposition than that it was the result of premeditation, and intended to afford facilities for the execution of his dark purposes. The direction of the first ball through the shutter excluded the possibility that it had been fired from any other place than the deceased's own premises ; and by a singular concurrence of circumstances, it was clearly proved that no person escaped from the premises after either of the shots, so that suspicion was necessarily restricted to the persons on the premises. The occurrence of the first attack during the temporary absence of the servant (that absence contrived by the prisoner himself) ; the discovery of a ramrod in the very place where the prisoner had been, and of his soiled stockings folded up so as to evade observation ; his interference with one of the witnesses ; his falsehoods respecting his pecuniary transactions with Goom and with the deceased ; and his attempts to exonerate himself from suspicion by implicating other persons—all these cogent circumstances of presumption tended to show not only that the prisoner was the only person who had any motive to destroy the deceased, but that the

crime could have been committed by no other person ; and while all the facts were naturally explicable upon the hypothesis of his guilt, they were incapable of any other reasonable solution. The prisoner was convicted and executed (*a*).

(3.) A respectable farmer, who had been at Stourbridge market on the 18th of December, 1812, left that place on foot a little after four in the afternoon, to return home, a distance of between two and three miles. About half a mile from his own house he was overtaken by a man who inquired the road for Kidderminster ; and they walked together for two or three hundred yards, when the stranger drew behind and shot him in the back, and then robbed him of about eleven pounds in money and a silver watch. After lingering ten days, he died of the wound thus received. The wounded man noticed that the pistol was long and very bright, and that the robber had on a dark-coloured great-coat, which reached down to the calves of his legs. Several circumstances of correspondence with the description given by the deceased conspired to fix suspicion upon the prisoner who for about fourteen months had worked as a carpenter at Ombersley, seventeen miles from Stourbridge. It was discovered that he had been absent from that place from the 17th to the 22nd of December ; that on the 23rd he had taken two boxes, one containing his working-tools and the other his clothes, to Worcester, and there delivered them to a carrier,

(*a*) Surrey Spring Ass. 1806, *coram* Macdonald, L.C.B. Shorthand Report by Gurney.

addressed to John Wood, at an inn in London, to be left till called for, the name by which he was known being William Howe ; and that on the 25th he finally left Ombersley, and went to London. Upon inquiry at the inn to which the boxes were directed, it was found that a person answering the description of the prisoner had removed them in a mealman's cart to the Bull in Bishopsgate Street, and that on the 5th of January they had been removed from thence in a cooper's cart. Here all trace of the boxes seemed cut off ; but on the 12th of January the police officers succeeded in tracing them to a widow woman's house, in a court in the same street ; when, upon examining the box which contained the prisoner's clothes, they found a screw-barrel pistol, a pistol-key, a bullet-mould, a single bullet, a small quantity of gunpowder in a cartridge and a fawn-skin waistcoat ; which latter circumstance was important, as the prisoner was seen in Stourbridge on the day of the murder, dressed in a waistcoat of that kind. By remaining concealed in the woman's house the police were enabled to apprehend the prisoner, who called there the following night.

Upon his apprehension, he denied that he had ever been at Stourbridge, or heard of the deceased being shot ; and he accounted for changing his name at Worcester by stating, first, that he had had a difference with his fellow work-people, and afterwards that he did it to prevent his wife, whom he had determined to leave, from being able to follow him. On being asked where he was on the 18th of December, he said he believed at

Kidderminster, a town about six miles from Stourbridge. Upon the prisoner's subsequent examination before the magistrates, he stated that he was at Kidderminster on the 17th of December, and at Stourbridge on the 18th (the day of the murder), but that he was not out of the latter town from the time of his arrival there, at one o'clock in the afternoon until half-past seven the following morning; that in the afternoon he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. The account which the prisoner thus gave of himself was proved to be a tissue of falsehoods. He had been seen by several witnesses between four and five in the afternoon of the day in question, on the road leading from Stourbridge toward, and not far from, the spot where the deceased was shot, and about half-past five he was seen going in great haste in the opposite direction, toward Stourbridge. He afterwards called at two public-houses at Stourbridge—at the first of them about six o'clock, and at the other about nine the same evening; at both of which the attack and robbery were the subjects of conversation, in which the prisoner joined; and he was distinctly spoken to as having worn a fawn-skin waistcoat. On the 21st of December the prisoner sold at Warwick a watch of which the deceased had been robbed, stating it to be a family watch. A letter was sent by the prisoner while in gaol to his wife: she being unable to read, had got a neighbour to read it to her. It contained a direction to remove some things concealed in a rick near Stourbridge; where, upon search being

made, were discovered a glove, containing three bullets, and a screw-barrel pistol, the fellow to that found in the prisoner's box. A gunmaker deposed that the bullet extracted from the wound had been discharged from a screw-barrel pistol, such as that produced, and that that bullet and the bullet found in the prisoner's box had been cast in the same mould.

The prisoner's denial, on his apprehension, that he had ever been at Stourbridge, or heard of the act, denoted a consciousness of the fatal effect of any evidence tending to establish the fact of his presence there. The discovery of a fawn-skin waistcoat in his possession, corresponding with that worn by him when seen at Stourbridge on the evening of the murder; his possession and disposal of the deceased's watch within three days after the robbery; his false statement that it was a family watch; the correspondence between the weapon found in the rick and that found in the prisoner's box, and between the bullet extracted from the wound and that found in the same box, and the peculiarity that the deceased had been killed by a wound from a screw-barrelled pistol—all these circumstances placed the guilt of the prisoner beyond any reasonable doubt, and there was no possibility of referring them to casual and accidental coincidence, or of explaining them upon any hypothesis compatible with his innocence. He was convicted, and before his execution confessed his guilt (*b*).

(4.) A foreigner, named Courvoisier, was tried at the Central Criminal Court (June 1840) for the

(*b*) *Rex v. William Howe*, Stafford Spring Ass. 1813, *coram* Bayley, J.

murder of Lord William Russell, an elderly man, seventy-five years of age, a widower, who lived in Norfolk Street, Park Lane. The deceased's household consisted of the prisoner, who had been in his service as valet about five weeks, and of a housemaid and cook who had lived with him three years, besides a coachman and groom who did not live in the house. On the 6th of May the female servants went to bed as usual, and the housemaid on going to bed lighted a fire and set a rush-light in her master's bedroom, which presented its usual appearance; the prisoner remained sitting up to warm his bed. The housemaid rose about half-past six on the following morning, and on going downstairs knocked, as usual, at the prisoner's door. At her master's door she noticed the warming-pan, which was usually taken downstairs; on going into a back drawing-room she found the drawers of her master's desk open and his bunch of keys lying on the carpet; a screw-driver lay on a chair. In the hall his Lordship's cloak was found neatly folded up, together with a bundle, containing a variety of valuable articles, most of them portable, such as a thief would ordinarily put in his pocket instead of deliberately packing up. In the dining-room she found several articles of plate scattered about. The street-door, though shut, was unfastened, but the testimony of the police who passed the house many times in the night rendered it very unlikely that any person had left it in that direction.

Alarmed by these appearances, the housemaid called the prisoner, and found him dressed, though only a few minutes had elapsed since she had

knocked at his door—a much shorter time than he usually took to dress. They went together downstairs ; and after examining the state of the dining-room and the prisoner's pantry, where the cupboard and drawers were all found opened, they proceeded to their master's bed-room, where he was found with his throat cut, in a manner which must have produced instant death. His Lordship usually placed his watch and rings on his dressing-table ; but they had been taken away, and his note-cases, in one of which the prisoner stated that he had seen a £10 and a £5 note a few days before, were open and emptied of their contents. A book was found on the floor, and his Lordship's spectacles lay upon it, and there was a candlestick about four or five feet from the bed, with the candle burned to the socket. These articles appeared to have been so placed to create the impression that his Lordship had been murdered while reading ; but he was not accustomed to read in bed, and only so much of the rush-light was burned as would have been consumed in about an hour and a half, though the candle was completely burned away. The prisoner stated that he left his master reading. Upon the door of the prisoner's pantry, leading to a back area, were marks as if it had been broken into, and the prisoner suggested that the thieves had entered by that door ; but the marks appeared to have been made from within, and none of them had been made by the application of sufficient force to break open the door ; the bolts appeared not to have been shot at the time, and the socket of one of them had been wrenched off when the door was open. The marks

on this door appeared to have been made with a bent poker found in the pantry. It was clear that no person had entered the premises from the rear, since, in one direction, they could have been approached only by passing over a wall covered with dust, which would have retained the slightest impression; and in the other, anyone must have passed over some tiling which was so old and perished as necessarily to have been damaged by the passing of any person over it; while from the testimony of the police it was equally clear that no person had escaped through the front door.

For several days the missing articles could not be found, and the case appeared to be wrapped in impenetrable mystery; but at length, upon a stricter search, his Lordship's rings and Waterloo medal, five sovereigns, and a £10 note, the latter of which had been removed from his note-case, were found concealed behind the skirting-board in the prisoner's pantry; and beneath the leaden covering of a sink was found his Lordship's watch, and several other articles were also found in other parts of the same room. But a quantity of plate which had been stolen still remained undiscovered, notwithstanding the most diligent efforts to discover it; and its non-production was the only circumstance which gave any apparent countenance to the possibility that the house had been robbed on the night of the murder, by parties who had escaped. The mystery was cleared up however in a remarkable manner, during the progress of the trial. About a fortnight before the murder, the prisoner had left a parcel in the care of an hotel-keeper with whom he had formerly lived

as waiter, whose curiosity was aroused by reading in a newspaper a suggestion that, as the prisoner was a foreigner, he had probably left the plate at one of the foreign hotels in London. He communicated with the police, and the parcel was opened and found to contain the missing plate. The prisoner had been known in this situation only by his Christian name; this circumstance accounted for the fact that suspicion had not been sooner excited by the narrative of the murder and robbery which had appeared in the daily journals. This discovery, in conjunction with the simulated appearances of external violence and robbery, and the conclusive evidence that the premises had not been entered from without, made it certain that the robbery of the plate and the murder had been committed by one of the inmates; while the manner and place of concealment, and the artless and satisfactory account given by the female servants, rendered it equally clear that the prisoner and he alone could have been the murderer. He made a confession of his guilt, and was executed pursuant to his sentence (*d*).

(5.) Perhaps one of the most extraordinary civil causes, in which the truth has been made manifest by the force of circumstantial evidence, was "The Great Matlock Will Case" (*e*), tried before Lord Chief Justice Cockburn in February 1864. The history of the litigation is somewhat remarkable. It related to the validity of three codicils to a will of one George

(*d*) Sessions Papers, 1840; 2 Townsend's Modern State Trials, 244.

(*e*) *Cresswell and others v. Jackson and another*; contemporaneous report published in 1864, Derby, Richard Keene. The Editor of the present volume was one of the counsel in the case.

Nuttall, and a suit was instituted in Chancery to establish them. An issue was directed by the Master of the Rolls (*f*), in which the plaintiffs asserted and the defendants denied that the codicils were genuine. It came on for trial in the first instance before Lord Chief Justice Erle, at the Derby summer assizes in 1859, when the jury pronounced in favour of the codicils. Not being satisfied with the verdict, the Master of the Rolls directed a second trial, which took place before Lord Chief Baron Pollock, at the Derby spring assizes 1860, when the jury found against the codicils. The Master of the Rolls was satisfied with this verdict, and refused a new trial. Application was made to the Lords Justices, who were divided in opinion, Lord Justice Turner being in favour of, and Lord Justice Knight Bruce against, granting a new trial. The plaintiffs appealed to the House of Lords. The case was heard by three of the Law Lords. The Lord Chancellor (Lord Cranworth) and Lord Wensleydale were of opinion that a third trial was desirable, Lord Chelmsford was of the contrary opinion. Accordingly, the application for a new trial was granted, and the trial was ordered to take place before the Lord Chief Justice of England (Sir Alexander Cockburn) and a special jury of the City of London. The case was begun on the 22nd of February 1864, and lasted eight days. It resulted in a verdict—not afterwards disturbed, although a motion was again made for a new trial—for the defendants.

The testator, George Nuttall, lived and died a bachelor at Matlock, and was possessed of real

(*f*) Sir John Romilly.

and personal estate worth in the aggregate somewhere about £60,000. He was a land surveyor, and had been in good practice, and though not of scholarly education, was very intelligent, widely self-instructed and an excellent man of business. He lived a somewhat secluded life, and had no near or intimate relations. The only person besides himself who lived in the house was Catherine Marsden his housekeeper. Her sister was the wife of John Else, who as the person chiefly benefiting by the codicils figures largely in this story. Else also lived at Matlock, and was assistant-overseer and County Court bailiff there. He was in a great measure brought up by the testator, and from boyhood had been employed to do writing and copying for him. The testator had two styles of handwriting, a free and running hand, like that of an educated man, and a more formal and clerk-like hand. Else's writing so closely resembled Mr. Nuttall's more formal hand that persons who were in the habit of corresponding upon business matters with Mr. Nuttall were often unable to tell whether he or Else had written the body of a letter.

The testator died on the 7th of March 1856. His will had been drafted by his attorney, Mr. Newbold, and had been copied out by his own hand in duplicate. Immediately after his death, one of these holograph copies was found in a cupboard in his room. It was dated 15th September 1854, and under it John Nuttall, a distant cousin of the testator, took the bulk of the real estate, and was residuary legatee of the personalty. Amongst many gifts was one to Catherine Marsden of the house for life, of the

furniture, and of £200 a year. To Else was left tithe property, which, after making allowance for certain charges, amounted to about £140 a year. On the day of the funeral a further search was made in the cupboard, whereupon a second holograph copy of the will was found in a packet sealed and marked "This is my rigt (*sic*) will." This duplicate bore the same date as the will first found, and was similar to it in every particular, except that the duplicate had an interlineation by which Else was to have a charge of £100 per annum, and Catherine Marsden a charge of £50 per annum, upon some property given to another legatee. This interlineation was the first of the imputed forgeries, and became a very important factor in the case. It was, however, inoperative in itself, inasmuch as it was not initialled by the attesting witnesses nor noticed in the attestation clause.

In April 1856 Mr. Newbold asked John Else for a voucher for some account which had been paid. A mass of the testator's papers had been conveyed to Else's house; amongst them, search being made for the voucher, Else asserted that he found the first codicil dated the 27th of October 1855. It was gummed up in an envelope which contained, besides the codicil, an epitome, upon half a sheet of note-paper, of the will and first codicil. The epitome, so far as it related to the will, was undoubtedly genuine. So also was an erasure of a devise to S.H. (Sarah Holmes) who had died in February 1855. The rest, relating to the first codicil, was alleged to be a forgery. The effect of this codicil was to revoke a devise in the will, and to give property

worth about £550 a year to Else, subject to four annuities of £20 each to four brothers of Catherine Marsden. An annuity of £50 a year was given to Mr. Newbold ; there was also a devise to a son of Mr. Newbold of the property which under the will was left to Sarah Holmes, and further dispositions in favour of Catherine Marsden.

Eight months afterwards, on the 16th of December 1856, Else professed to have found another codicil, dated the 6th of January 1856. He had been appointed to succeed Mr. Nuttall as surveyor of highways ; a question arose as to the price of teamwork. The book containing this information was alleged to be at Mr. Newbold's office, and Mr. Newbold told Else to search amongst a number of Mr. Nuttall's papers which were there. Else found the book, as was stated, in the presence of Mr. Newbold and his son. In it was pinned the second codicil. Roughly speaking, the first codicil diverted from the original dispositions about one third of Mr. George Nuttall's property, and the second codicil disposed of about another third—(except for some small annuities, including one of £20 to the son of Job Knowles, one of the attesting witnesses)—in favour of Else and the Marsdens.

The circumstances under which the third codicil was found on the 9th of October 1857 were even more startling. It was discovered in a hayloft, which, it was suggested, the testator had used as a secret room. Else's account was that he desired to have the place cleaned, that he took a boy with him and told him to clean the window ; that the boy asked him (Else) to open the window, that he took hold of

the window board to help himself up, when it came out ; that he was about to replace it when the boy exclaimed "What's that ?" Whereupon he looked and found a hole inside the wall containing a jar. In the jar were a canvas bag and a paper. In the canvas bag were twenty sovereigns ; the paper was the third codicil dated the 12th of January 1856, six days later than the date of the second codicil. As to its dispositions, it is only necessary to say that the net result of the three codicils, so far as the interest of John Nuttall and his children was concerned, was to reduce the large property left to him to about the value of £210 a year, and, so far as Else was concerned, to increase his interest under will and codicils from £140 a year to about £1,200 a year.

John Nuttall, the original devisee, died about six weeks after the testator. He died of consumption, and was either dead or moribund when the first codicil came to light. He was a stonemason by trade. His children were very young, and he appointed as executors and trustees of his will two friends and fellow workmen, Jackson and Shaw. They were at the times when the first and second codicils were put forward unable to afford litigation. When, however, the third codicil turned up, they, greatly to their credit, determined at all hazards to dispute the codicils. It is interesting to be able to add that before the long litigation came to an end they were in business on their own accounts, and one of them ultimately became contractor for some of the largest works, public and other, carried out in his day.

The first codicil purported to be witnessed by two

labourers in the testator's employment : they proved unsatisfactory witnesses, and had to be examined adversely by the plaintiffs who sought to establish the codicil. They contradicted one another and themselves, and prevaricated to the last extent. There can be little doubt that they had been called in by the testator to witness something, probably a codicil (g) ; and the suggestion made was that that codicil was found by Else, and suppressed by him, and that the attesting witnesses to the first codicil had really witnessed a codicil executed by the testator, which they knew to be different from the one to which they were asked to swear as being the testator's. The second and third codicils were both attested by Job Knowles, a farmer and neighbour of the testator, and John Adams, an elderly surgeon in the neighbourhood. Both these witnesses said they were at the testator's house and signed as witnesses on the 6th and 12th of January 1856 respectively. Catherine Marsden was not called as a witness, a fact which caused much comment ; Else appeared and swore to finding the codicils, and a few other witnesses were called as to various circumstances, including a bank clerk who declared that

(g) In the epitome, S. H. had been crossed out, no doubt after the death of Sarah Holmes. The preceding entry in the epitome was "Hardwich and Twitch Nook to M. T." These properties were in the will left to Maria Travis. The entry next to this was "Brockhurst, S. H." At some time brackets had been put both to the right and to the left of these two entries, and it is a curious circumstance that certain blottings of both the two diagonal lines which erased "S. H." and the brackets made it certain that both the erasure and the brackets were written at once, and the paper folded over before the ink was quite dry. The inference was irresistible that after Sarah Holmes's death, there had been a codicil by which Brockhurst was added to the devise already made to Maria Travis.

the signatures were genuine, and that he would have paid cheques so signed by the testator.

The defendants' case involved, as the Lord Chief Justice remarked, charges of conspiracy to commit fraud, forgery and perjury. Stress was of course laid on the extraordinary character of the circumstances under which the codicils were produced, their appearance at intervals, each in the order of date, and their uniform tenor in favour of Else and the Marsdens. These incidents, as the Lord Chief Justice subsequently pointed out to the jury, strange as they might be, were not impossible and might be accepted if the jury were satisfied by the rest of the evidence that the codicils themselves were genuine. The real strength of the defendants' case lay in the documents themselves and the conclusions to be gathered from their contents. This part of the case was worked up with minute care, and the details are instructive in showing the steps by which circumstantial proof becomes irresistible.

The will and codicils were obviously in different styles of writing ; but the testator wrote in two styles, and the codicils, as well as the interlineation in the will, were alleged to be in his more formal style, which resembled John Else's writing. Hence it became necessary to examine the genuine and disputed documents for further distinctions, and to compare them with undisputed writings of the testator and John Else.

There were mistakes in spelling in both the will and the codicils. In the will, which was as long as the three codicils taken together, appeared three words misspelt, viz. "surgion," "debth," "oweing," and

in some fifty or sixty letters and other undisputed writings of the testator (some of great length, and all obtained and put in without any selection) "chage" (for charge), "stile" for "style," "rabbitts," "untill," "strength," "seperate," "exhempt," and perhaps some others; but those here given were the most striking. The codicils contained many more blunders, and of a much grosser and more ignorant kind; for example, "executers," "conferm," "hears" (heirs), "contiguaes" (contiguous), "annexd," all of which were spelt correctly in the will. Great emphasis was laid upon two mistakes which appeared in the codicils in respect of words which were spelt correctly in the will. These were "doughter" for "daughter," which the testator always spelt correctly, but which from a comparison with very many of his writings, it was shown that Else always spelt with an "o," except upon one single occasion when he wrote "dughter," (*h*) and "tith commuation"—for "tithe commutation." Some twenty-eight letters were produced written by the testator to the Tithe Commutation Commissioners, in which the expression was never incorrectly spelt.

Many gross mistakes in spelling were adduced from other documents in Else's handwriting—such blunders as "pursons," "shuld," "gitting," "usuel," and so forth, of a different character from most of the testator's mistakes, which were often mere

(*h*) "Doughter" is a phonetic misspelling, corresponding with a pronunciation of the word common in that part of the country. Else was accustomed to serve County Court processes, and many County Court documents were produced, indorsed by him with memoranda of service "by leaving a copy with his doughter."

slips of a rapid penman, or archaisms, as "oweing," "untill," and "musick."

Else very frequently put a strong comma after the signature of his own name; Mr. Nuttall occasionally put a light full stop after his signature—but never a comma; the signatures to the three codicils had a strong comma after "George Nuttall." In respect of handwriting, perhaps the most cogent proof of all was discovered in the crossing of the "t" in the simple word "to," when standing by itself. In the will the "t" was uncrossed fifty one times, whole-crossed (*z*) five times, but half-crossed never; so in fifty of the testator's letters the "t" was uncrossed one hundred and thirty-one times, whole-crossed fourteen times, but, again, never half-crossed. In fact, throughout a very large quantity of undisputed writings of the testator *only two* half-crossed "t's" in the word "to" were discovered, and they were in two instances in which the writing was of the stiffest and most formal kind—one of them occurring in the phrase "Schedule to the —"; the words being almost a kind of print. On the other hand, a great number of Else's writings showed that half-crossing the "t" in "to" was his habit. In one document of Else's—a will which he had written for one Luke Wilson—twenty-six out of twenty-eight "t's" in the word "to" were half-crossed, and in another fifteen out of sixteen. In the interlineation of the will "to" occurred three times, and each time the "t" was half-crossed; and in the three codicils there were

(*z*) The crossing stroke extending both right and left of the down stroke.

sixteen half-crossed "t's," twelve uncrossed, and thirty-three whole-crossed. The epitome of the will and the first codicil presented so small a field for criticism of handwriting that it had always been a difficulty in the way of the defendants. The disputed portions were far more like the running hand of the undisputed part, and presented a closer general resemblance to the handwriting of the testator than any other of the incriminated documents. It had, therefore, been greatly relied upon by the plaintiffs, and it had this cardinal importance: that, if the whole of it were genuine, it followed almost for a certainty that the first codicil, with all its solecisms and mistakes in spelling, was genuine. If so, a great difficulty was removed from the acceptance of the second and third. The fact that the crossing of the "t" in the preposition "to" was really a key to the two handwritings was discovered between the second and third trials. The epitome contained fourteen "t's" relating to the will; of these, one was whole-crossed, and thirteen uncrossed. It was Mr. Nuttall's prevailing habit to leave the "t" (in "to") uncrossed. The disputed portions of the epitome contained the word "to" seven times. In every instance the "t" was half-crossed, and the half-page of note-paper, which had been more or less of a stumbling-block in the way of the defendants, became one of their strongest pieces of evidence. Indeed, when carefully considered it is of irresistible force—it is one of those circumstances "which never lie." The Lord Chief Justice said, in the course of his summing up, that the habit of crossing a "t" in "to" in a particular way might at first sight

appear to be a small matter ; but that in a case which was full of wonders, this was, perhaps, the most remarkable as well as the most convincing incident.

(6.) A curiously similar instance, in which a single stroke was again decisive as to the genuineness of disputed documents, occurred in the case of *Howe v. Burchardt* and another, which was tried before Mr. Justice Wills at the Middlesex Sittings in February 1891.

The plaintiff Howe brought an action against the executors of a Mr. Ashton on a cheque for £1,375, which he alleged that the testator had given to him three or four days before his death. The body of the cheque was admittedly written by the plaintiff, but as he alleged, at the request of the testator. In order to show how the sum of £1,375 was arrived at, Howe produced a memorandum, which he alleged the testator had written, containing a number of figures. There happened to be amongst these figures several sevens. Mr. Ashton was a comparatively well-educated man, who wrote with the free pen of a rapid writer. Howe had been originally a railway porter, who had raised himself somewhat in the world, and was then carrying on a small business. He wrote the laboured hand of an uneducated man. Many hundreds of sevens written severally by Ashton and by Howe were produced. They were found in account books, upon paying-in slips, in letters, and many other documents. Ashton always made his seven by one continuous action of the pen ; Howe always by two, invariably making at the beginning of his figure a heavy vertical bar which

crossed the short horizontal stroke at the top of the seven—thus: Ashton's figure 7; Howe's '7 or 7 or 7. In no instance could any deviation from this law be discovered. The cheque sued upon contained two sevens, and the memorandum showing how the £1,375 was arrived at several more, all made in Howe's fashion. Some other documents were in dispute, as to which the same observation applied.

Another notable and interesting fact in the same case, which bore directly upon the genuineness of the cheque, was that the cheque was signed "B. Ashton." Mr. Ashton was in the habit of signing his letters in that way, but his cheques were always signed "Benj. Ashton": and a letter was produced upon the trial which was admitted to have been in the possession of the plaintiff shortly after the death of the testator, signed "B. Ashton," and bearing so striking a resemblance to the signature on the cheque that it was alleged by the defendants to have been the original from which the forged signature had been traced. Mr. Ashton's bankers produced more than 870 of his cheques, extending over five years, including several signed within a very few days of his death, none of which were signed "B. Ashton." Howe was unaware of this fact. The case was a complicated one, and involved a series of inventions by the plaintiff of the most ingenious and audacious kind, the exposure of which required twelve days of patient investigation (*k*). Howe was afterwards tried at the Old Bailey, before Mr. Justice Charles, for forgery, and convicted.

(*k*) See also p. 197, *supra*, where another fraudulent device in this case is related.

(7.) A remarkable case, illustrating how one small clue or fact may lead not only to the identification of the culprit, but to the detection of his motive and to the complete circumstantial proofs of his crime, was tried before the Lord Chief Justice of England at the Central Criminal Court in February 1901. The crime was committed in Norfolk, but the proceedings were removed under the provisions of 19 & 20 Vict. c. 19 (*l*).

At about six o'clock on the morning of Sunday, the 23rd of September 1900, the body of a woman was found on the south beach at Yarmouth. She was lying on her back, her hands by her side, and her hair loose upon her shoulders; there were scratches and abrasions on her face, and a mohair bootlace was tied so tightly round her neck that the flesh was doubled over it. Death was due to strangulation, and having regard to the tightness with which the lace was tied and the way it was knotted, there was no doubt whatever that the woman had been murdered. She had rings upon her fingers; but there was no clue to her identity except a laundry mark, 599, on some of her linen. She was a stranger to Yarmouth, having come there with her baby on the 15th of September, and had been lodging since that date with some people named Rudrum. Nothing was known of her except that she went by the name of Mrs. Hood, owing to the fact that she had received a letter on Friday evening (21st September) addressed in that name. It bore the Woolwich post-mark. A few days before her death she had been photographed on the

(*l*) Commonly known as "Palmer's Act."

shore, and the photograph was found in her room—it showed that she was wearing a long chain; and it was proved that she was wearing a long gold chain and a silver watch when she went out on the evening of Saturday (22nd September). The watch and chain were not on the body, and no trace of them could be found. She was last seen alive by Mrs. Rudrum on that Saturday evening, between eight and nine o'clock, waiting near the Town Hall, and obviously expecting to meet someone—Mrs. Rudrum having stopped and conversed with her for a short time. This was all that could be discovered about the deceased woman at that time, and towards the end of October the coroner's jury were forced to find a verdict of murder of a woman unknown by a man unknown.

Ultimately it was discovered that the number 599 was the laundry mark of linen coming from a house at Bexley Heath, in which a woman named Bennett had been living with a baby. She proved to be the woman in the photograph. This led to the arrest, on the 6th of November, of the prisoner Herbert John Bennett, who was her husband. He was then living at Woolwich, and was employed as a labourer at the Arsenal. In the room in which he lodged were found a long gold chain and silver watch, and these were identified at the trial as having belonged to his wife, and as having been worn by her on the night of Saturday, the 22nd of September. On his arrest the prisoner said he had never been to Yarmouth; but the following facts were proved which revealed his previous history and his movements at the date of the murder. The

prisoner made the acquaintance of the deceased by taking music lessons of her; they were married in July 1897, and they lived with the deceased's grandmother until her death in April 1898. Their baby was born in October 1898. In March 1900 they went to South Africa and back, having booked passages in the name of Mr. and Mrs. Hood. Returning in May of the same year, they took rooms at Plumstead, where they lived together unhappily, the prisoner threatening his wife's life, and saying that he wished she were dead. From June the prisoner was leading a double life. He took a room at Woolwich, where he was employed for some time as a grocer's assistant, and passed as a single man; the deceased took a house at Bexley Heath and lived there, being occasionally visited by the prisoner. About this time he was introduced, through a fellow lodger at Woolwich, to a girl named Alice Meadows, and paid her a great deal of attention. They arranged to go to Yarmouth together for the Bank Holiday, and on the 30th of July the prisoner wrote to Mrs. Rudrum for lodgings, but received an answer that her lodgings were engaged for Bank Holiday. The letter to Mrs. Rudrum was in the same handwriting, and was written upon the same kind of blue paper as the letter already mentioned as addressed to Mrs. Hood, and received by the deceased woman on Friday, the 21st of September. The prisoner and Alice Meadows, however, went to Yarmouth, and stayed at the Crown and Anchor Hotel. At the end of August they went for a fortnight to Ireland. The prisoner spent money freely, and upon his return was engaged to

Alice Meadows, and gave her a ring. They were to be married the following June.

On Friday, the 14th of September, the prisoner visited his wife and child at Bexley Heath. Preparations were at once made by the wife for leaving the house. The same evening the prisoner saw Alice Meadows in Bayswater and told her that he could not see her the following day as he had to go to Gravesend on account of the illness of his grandfather. The following day (the 15th) he did not work at the Arsenal. The wife arrived at her lodgings in Yarmouth at about nine o'clock in the evening of the 15th. She stayed only long enough to put the child to bed, and then went out, not returning till nearly midnight. The prisoner arrived at the Crown and Anchor some time after eleven o'clock on the same evening, slept there, and went up to London by the first train in the morning at 7.20. He reached London about 11.30, and at 12.0 noon was at the house of Alice Meadows's mother, in Stepney. The following Thursday he again told Alice Meadows that he could not see her on Sunday because he intended to go to Gravesend to see his grandfather. On Saturday (22nd) at about 3.0 P.M. he spoke to his landlady at Woolwich as if he were going away by train; he had a time-table in his hand. At about 10.0 that evening—after Mrs. Rudrum had spoken to the deceased waiting outside the Town Hall—she and the prisoner were seen in a public-house on the quay at Yarmouth. At 11.0 two people on the beach saw a man and a woman seat or lay themselves on the sand, and soon

after heard cries of "Mercy! mercy!" and groans, and then no further sound.

At about midnight the prisoner again arrived at the Crown and Anchor, hot and breathless, and said he must catch the early morning train to London. This he did, and went straight to Hyde Park, where he met Alice Meadows. His subsequent conduct was consistent only with a knowledge that his wife was dead. He urged Alice Meadows to marry him at once. He paid the house agents £5 to get rid of the house his wife had taken at Bexley Heath. He gave Alice Meadows some of his deceased wife's property, and told her that a cousin was going to South Africa with his wife and child, and that he had bought their furniture. In consequence, on the 17th of October, Alice Meadows gave up her situation in Bayswater, and a residence was fixed upon, and at the prisoner's arrest the marriage was imminent. After a trial lasting a week the prisoner was convicted, and afterwards executed (*m*).

It is scarcely possible, in the absence of unimpeachable direct evidence, to conceive of any grounds of moral assurance and judgment more satisfactory and conclusive than those afforded by such combinations of facts as were presented in the foregoing cases.

(*m*) *Rex v. Bennett*, known as The Yarmouth Murder, *coram* Lord Alverstone, L.C.J., C. C. C., Feb. 24, 1901. See the Times Report, Feb. 25, *et seq.*

## SECTION 4.

## CONCLUSION.

THE rules of evidence are the practical maxims of legal and philosophic experience, matured and methodized by a succession of thoughtful men, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion. They have their origin in man's nature, as an intellectual and a moral being; and "are founded" (to use the language of one of the most eloquent of advocates), "in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." Such rules must of necessity be substantially the same, in all cases; and the observance of them is indispensable to social security and happiness. To disregard them, under whatever circumstances or pretext, is to subject to the sport of chance those fundamental rights which it is the object of social institutions to secure.

The design of this Essay has been to investigate the foundations of our faith in circumstantial evidence, to ascertain its limits and its just moral effect, and to illustrate and confirm the reasonableness of the practical rules which have been established in order to prevent unauthorised assumptions, and to secure to relevant facts their proper weight. It has been maintained that circumstantial evidence is inherently of a different and inferior nature from direct and positive testi-

mony; but that nevertheless such evidence, although not invariably so, is frequently superior in proving power to the average strength of direct evidence; and that, under the safeguards and qualifications which have been stated, it affords a secure ground for the most important judgments in cases where direct evidence is not to be obtained.

It must, however, be conceded, that "with the wisest laws, and with the most perfect administration of them, the innocent may sometimes be doomed to suffer the fate of the guilty; for it were vain to hope that from any human institution all error can be excluded"(n). But certainty has not always been attained even in those sciences which admit of something approaching to demonstration; still less can unfailing assurance be invariably expected in investigations which are largely concerned with moral considerations and with the facts and impulses of human nature. Nor can any argument against the validity and sufficiency of circumstantial evidence as a means of arriving at moral certainty be drawn from the fact that it has occasionally led to erroneous convictions, which does not equally militate against the validity and sufficiency of moral evidence of every kind; and it is believed that a far greater number of wrong convictions have arisen from false and mistaken direct and positive testimony, than from erroneous inferences drawn from circumstantial evidence. "Admitting," said Mr. Justice Story, "the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence,

and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice" (o).

These considerations ought not therefore to produce an unreasonable and indiscriminate scepticism; their legitimate effect should be to inspire a salutary caution in the reception and estimate of circumstantial evidence, and to render the legislator especially wary how he authorises, and the magistrate how he inflicts, punishment of a nature which admits neither of reversal nor mitigation. It is indispensable, however, under every system, to the very existence of society, that the tribunals should act upon circumstantial evidence. Infallibility belongs not to man; and even his strongest degree of moral assurance must be accompanied by the possible danger of mistake; but after just effect has been given to sound practical rules of evidence, there will remain no other source of uncertainty or fallacy than that general liability to error, which is incidental to all investigations founded upon moral evidence, and from which no conclusion of the human judgment, whether based upon direct or circumstantial evidence, can be absolutely and entirely exempt.

(o) Wharton's Criminal Law of the U. S. 343, 3rd ed. 1855.

## AMERICAN NOTES.

[NOTE TO CHAPTER VIII.]

See note to Chapter II on the relative value of direct and circumstantial evidence.

### *Weight of Circumstances as a Basis for Inference.*

In *People v. Videto*, 1 Parker Crim. (N. Y.) 603, Walworth, J., thus classifies the presumptions arising from the proof of various circumstances, and discusses the strength of the inferences to be drawn from them.

“1. *Violent Presumptions.* — Where the facts and circumstances proved would necessarily attend the fact presented. As, if your horse had been shot in the stable by a musket-ball, and it was proved that a man was seen immediately before to load his gun and go into the stable; that the report of a musket was heard in the stable and that the man immediately came out with his gun and fled. These circumstances would raise a violent presumption that the man shot the horse, because the loading of the gun, the report in the stable, the gun being unloaded when he came out, are all facts which must necessarily attend the fact presumed; to wit, that he shot the horse. And upon such testimony, unexplained, it would be the duty of a jury to give a verdict against him, equally as it would be if the shooting of the horse was positively sworn to by the same witness. For in either case, if the witness was to be credited, there could be no reasonable doubt of the guilt of the accused, although there was a possibility of his innocence.

“2. *Probable Presumptions.* — Where the facts and circumstances proved usually attend the fact presumed. As, if your horse is stolen, and shortly thereafter he is found in the possession of the accused, who refuses to give any explanation as to the manner in which the horse came into his possession. These circumstances raise a probable presumption that the accused com-

mitted the theft. It is every day's practice to convict on such circumstantial evidence, if the transaction is unexplained.

"3. *Light or Rash Presumptions.*—When the facts and circumstances proved might probably attend the fact presumed. As, if a man gave medicine to his wife, and she died shortly afterwards, it would be a *light* presumption of the fact that he had given her poison instead of medicine, and could not legally authorize his conviction for murder. But there are many circumstances which, taken separately, would only amount to *light* or *rash* presumptions, and as such entitled to no weight, which, if they were well proved and connected together in one case, might amount to *probable* or even to *violent* presumption of guilt. As, if a wife die very suddenly, with the usual symptoms of having been poisoned. It is proved that she and her husband were on ill terms; that he had threatened her life; that he gave her liquor to drink shortly before those symptoms appeared; that he was seen to put something into the bottle of liquor; that he purchased arsenic the day before; that the bottle being inquired for he immediately flung away the liquor remaining therein; that he gave no satisfactory account of what had been done with the arsenic; that he caused her to be buried unusually soon after her death; that the contents of her stomach being analyzed were found to contain arsenic. Each of these circumstances, taken by itself, and perhaps two or three of them together, would be nothing more than *rash* or *light* presumptions of the guilt of the husband. But if all the circumstances I have enumerated were satisfactorily proved by credible witnesses and were left unexplained by the accused, they might, when taken together, carry irresistible conviction to the minds of the jury that he had killed his wife by poison."

*Relative Weight to be Given to Circumstances.*

Where there is one circumstance favorable to a certain conclusion, and several circumstances unfavorable to it, the first circumstance is not to be weighed against each of the others separately but against them all collectively. In illustration of this the following case is stated in Hubback's Succession, Chapter VI. 48 Law Library, \*447. "Elizabeth Jennens, the ancestress of the plaintiff, was shown to have been, in adult life, a Roman Catholic.

The family with whom it was endeavored to connect her were Protestant. Suppose it to be more probable that she should have changed her religion than that there should have been two or more persons of one name, district, and period, and corresponding in some other particulars, and let the relative probabilities be as 2 to 1; whereby if the truth be denoted by unity, the greater probability may be represented by the fraction  $\frac{2}{3}$ . But it was further proved that the plaintiff's ancestress could not write her name, but made her mark. Let it again be conceded to be more probable by 5 to 4 (equal to  $\frac{5}{9}$  of the truth) that the daughter of an opulent family should have been so much neglected, in youth, or incapacitated by disease, or other causes, as to have been unable to write, than that there should have been more than one Elizabeth Jennens, with the proved characteristics in common. The chances in each step of the argument are thus in favor of the identity; but the result from both is to be ascertained by multiplying the fractions into each other,  $\frac{2}{3} \times \frac{5}{9}$ , which will give  $\frac{10}{27}$  as indicating the degree of likelihood that there was but one Elizabeth Jennens; that is, the probabilities are as 10 in favor of that conclusion, to 17 against it.

"Of course a very few more incongruities would make the preponderance of the probability against the identity overwhelming; and in this case, several others being proved, the Vice Chancellor thought it so clear that the plaintiff's ancestress was not the iron-master's daughter that he refused an issue to try (what depended on such identity) the plaintiff's proximity of kindred to the intestate in the cause."

In discussing the defence of alibi, Chief Justice Shaw, in *Com. v. Webster*, 5 Cush. 295, 318, says: "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence, upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail."

*Multitude of Circumstances.*

Circumstances taken separately may be wholly insufficient upon which to base an inference, and yet all together be absolutely convincing. This is especially true when the evidence is derived from various independent sources, and there are various coincidences all leading to the same conclusion. *U. S. v. Searcey*, 26 Fed. Rep. 435; *U. S. v. Isla De Cuba*, Fed. Cas. 15447.

Generally the multitude of circumstances from which an inference is drawn guarantees the correctness of the inference, but in some cases the truth of each circumstance depends upon the truth of a preceding circumstance. In such case the circumstances may truly be likened to a chain, and then the conclusion drawn is no stronger than the weakest link. *State v. Shines*, 125 N. C. 730; *Tompkins v. State*, 32 Ala. 569, *Bressler v. People*, 117 Ill. 422.

A fact which, standing alone, would be consistent with innocence, may, when taken in connection with other facts, become significant evidence of guilt. *Com. v. Kennedy*, 97 Mass. 224.

"Evidence which is colorless taken by itself, which establishes neither a constituent nor a fact pointing by inference to a constituent of a crime, may be made significant by other evidence, and so may be made admissible. It need not be self-justifying without regard to the other circumstances proved." *Com. v. O'Neil*, 169 Mass. 394; *Com. v. Williams*, 171 Mass. 461.

Since small, and, when considered alone, meaningless circumstances may be of importance in connecting other circumstances, every fact, however trivial, which can aid the jury in reaching a conclusion should be admitted in evidence, even so slight a circumstance as the burning of a light at a late hour of the night (*People v. Johnson*, 2 Wheeler Crim. Cas. (N. Y.) 361), or the whispering together of two women after they have retired for the night (*People v. Bemis*, 51 Mich. 422), or that one charged with larceny was seen about the time of the theft in company with one who afterwards had the stolen goods in his possession. *Langford v. State*, 17 Tex. Crim. 445.

*Considerations Increasing the Force of Circumstances.*

The possession of money of the same kinds as that recently stolen may be of slight or no weight as evidence against the accused. But if such money is rarely seen in circulation at the place where found the fact of possession becomes of much greater importance. And its value as evidence is still further increased when both the money found in possession of the accused and that which was stolen consists of a combination of a large number of Chilian half-ounces and a single Peruvian ounce. *People v. Getty*, 49 Cal. 581.

The weight of footprints, as evidence to identify the accused as the one committing the crime, is greatly increased if they are shown to have not only the same size and shape of those made by the defendant's shoes, but that they have some special peculiarity corresponding to the defendant's shoes or his physique. *Glover v. State*, 114 Ga. 828 (V-shaped mark in the heel); *McGill v. State*, 25 Tex. App. 499 (shoe run down at the heel, and patched); *Green v. State*, 17 Fla. 669 (leg deformity); *Schoolcraft v. People*, 117 Ill. 271 (right foot turned in).

*Circumstances Drawn from Independent Sources.*

"One other general remark on the subject of circumstantial evidence, is this: that inferences drawn from independent sources different from each other, but tending to the same conclusion, not only support each other, but do so with an increased weight. To illustrate this, suppose the case just mentioned of the wad of a pistol consisting of part of a ballad, the other part being in the pocket of the accused; it is not absolutely conclusive that the accused loaded and wadded the pistol himself; he might have picked up the piece of paper in the street. But suppose that by another and independent witness it were proved that that individual purchased such a ballad at his shop; and further, from another witness, that he purchased such a pistol at another shop. Here are circumstances from different and independent sources, bearing upon the same conclusion; to wit, that the accused loaded and used the pistol; and they, therefore, have an increased weight in establishing the proof of the fact." *Shaw, C. J., in Com. v. Webster*, 5 Cush. 295, 317.

It greatly strengthens a case resting on circumstantial evidence and negatives the existence of fraud and perjury on the part of witnesses to show that they have acted independently, and that each has reported the facts within his knowledge without knowing the presence of other witnesses or without knowing the existence of the other circumstances. *Rex v. Genge*, Camp. 13, 3 Enc. Evidence, 69.

*Corroborating Circumstances.*

Where an accomplice testified that he and the defendant carried the body of the deceased down to the river at a certain time, where it was later found, the accomplice's wife may testify that her husband was absent from home at the time specified. *Lindsay v. People* 63 N. Y. 143.

*Dangers Inherent in Circumstantial Evidence.*

And yet notwithstanding the multitude of circumstances from which an inference is drawn, that inference may be incorrect. "In cases supported by circumstantial evidence, juries should remember that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself and easy of detection if attempted; yet, the witnesses in such cases are more likely to make unintentional misstatements than those who give direct testimony. The truth of the facts they attest depends frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses respecting dates, time, distances, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these in general are the links in the chain of circumstances by which guilt is sought to be established. The number, too, of the witnesses, who must all speak the truth or some link will be wanting, renders additional caution the more necessary. Besides, it must be remembered that, in a case of circumstantial evidence the facts are collected by degrees. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Pre-

suming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Though both sportsmen and policemen alike would be horrified at anything unfair or 'unsportsmanlike,' yet, as both start with this object in view, it is easy to unintentionally misinterpret innocent actions, to misunderstand innocent words,—for men readily believe what they anxiously desire,—and to be ever ready to construe the most harmless facts as confirmations of preconceived opinions. These feelings are common alike to the police, to counsel, engineers, surveyors, medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth." 1 Taylor on Evidence, § 68.



## APPENDIX

### NOTE TO P. 144.

THE Editor is indebted for the following note to his son, W. A. WILLS, M.D., F.R.C.P.

During the last three years experiments have been carried on by Bordet and Uhlenhuth which have resulted in the elaboration of a test by which it is claimed that human blood can be distinguished from the blood of all other animals (except, perhaps, that of the ape); and, further, that the blood of each individual animal can be identified. This test depends upon the fact that the blood serum of one animal, after certain treatment, is hæmotoxic to the blood of the same animal and to that of no other, and is closely akin to the (Vidal's) serum reaction frequently used for the diagnosis of enteric fever. It is equally applicable to fresh blood and to blood stains which have been dried and exposed to the air for some considerable time.

As this method is little known, it may be of interest to describe the technique in some little detail.

Ten cubic centimetres of defibrinated human blood are injected into the peritoneal cavity of a rabbit every six or eight days, and after five such injections the blood serum or the blood itself of the rabbit is available for use as follows:

Dissolve the spot of blood that requires identification in normal saline solution—or, better, distilled water; filter, and place 4 or 5 cub. cent. in two small test tubes.

To one of these (a) add 0·5 cub. cent. of rabbit's blood

made hæmotoxic as above ; to the other (b) add 0·5 cub. cent. of normal rabbit's blood. A third control tube (c) may be made with 4 or 5 cub. cent. of a solution in distilled water of the blood of any other animal, except ape or man.

Place the solutions in a warm chamber at 37° C.: if the spot of blood be human, in an hour's time the tube (a) will show a turbidity or precipitate, while (b) and (c) will remain perfectly limpid.

This can be even better carried out in hanging drop preparations under the microscope. It is necessary that the quantity of serum used in this test should be carefully measured to ensure equal treatment of the various tubes.

It is obvious that by preparing a number of sera rendered hæmotoxic by the blood of different animals, a spot of blood of unknown origin can be identified, provided that it belongs to one of the various species of animals with whose blood hæmotoxic rabbit serum has been prepared.

*Vide*, British Medical Journal, March 30, 1901, p. 788.

*Ibid.* Epitome, June 29, 1901, p. 436.

Journal, Royal Microscopical Society, 1901, p. 791.

#### NOTE TO P. 381. By THE EDITOR.

A constant source of difficulty in judicial investigations lies in what seems almost like an ineradicable tendency of human nature—an impulse to appear to know everything about occurrences of which the witness in reality knows but a part, and often a small part. I have been constantly struck with this phenomenon in cases of collision between two vehicles. No matter how instantaneous the occurrence may have been, the witnesses, unless stunned at the time, almost always speak to every detail. It seems to require some moral courage to say "I don't know." It is not that the witnesses mean to deceive, but they have reasoned out what they never really observed, and confound the impressions so produced with those of actual observation. I

once met with a bad carriage accident myself. I was particularly well situated for observation, and was not stunned for more than a few seconds. I believe I know how it happened, but I am conscious that I know it only by reasoning upon the little that I did see. Had I not had the warning of long professional experience, I have little doubt that I should have come to suppose I had seen it all.



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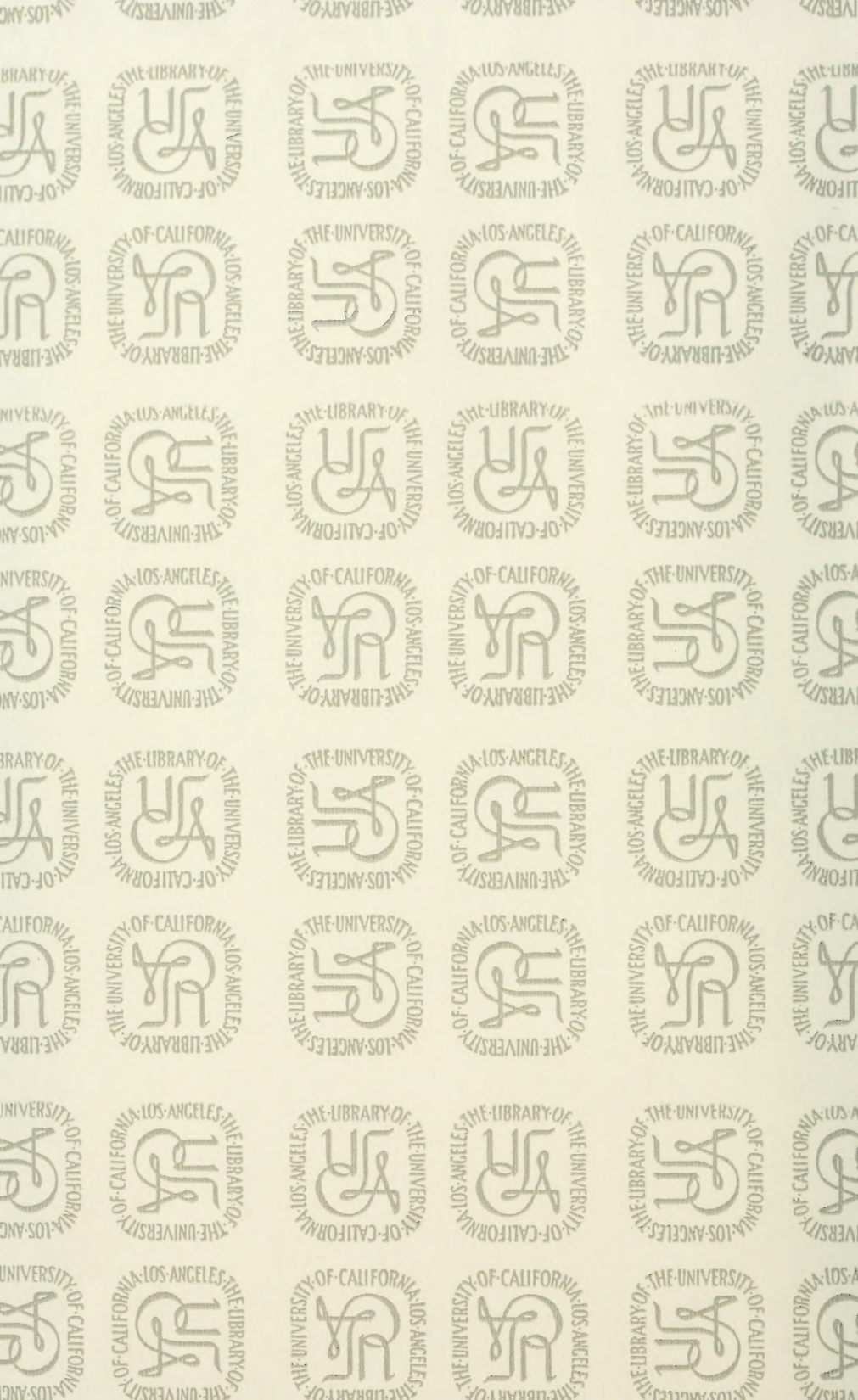






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